Supreme Court, U.S.
FILED

03 788 NOV 26 2003

No. _____

In The

Supreme Court of the United States

IN RE: DAVID LYNN ALEXANDER (DOC #85828)
and HARRY JUNIUS GRANGER (DOC #85829)

PETITION FOR WRIT OF HABEAS CORPUS

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QUESTIONS PRESENTED FOR REVIEW

1. A. Whether 28 U.S.C. §2244(b)(1) establishes an absolute bar against repeating a claim urged in a prior petition for habeas corpus where: a) the claim was previously defeated by the prosecution's fraud on the courts; and b) the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the petitioner guilty of the underlying offense.

   B. If, even under such circumstances, the procedural bar against assertion of a repetitive claim is absolute, whether §2244(b)(1) amounts to an unconstitutional suspension of the writ under Article I, §9, clause 2 of the United States Constitution.

2. A. Whether the one-year time limitation of 28 U.S.C. §2244(d) runs: a) for an entire *application* from the date when the *last* impediment to filing was removed or the *last* factual predicate for a claim was discovered through the exercise of due diligence; or b) for each *claim* from the tolling dates set forth by the provision.

   B. Whether the prosecution's fraudulent response to a claim in a petition for habeas corpus constitutes an "impediment to filing an application" within the meaning of §2244(d), so as to toll the one-year time limitation as to such claim.

   C. If such prosecutorial fraud does not toll the one-year time limitation, whether §2244(d) amounts to an unconstitutional suspension of the writ under Article I, §9, clause 2 of the United States Constitution, where the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to

QUESTIONS PRESENTED FOR REVIEW – Continued

establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the petitioner guilty of the underlying offense.

3. Whether the Fifth Circuit Court of Appeals manifestly abused its discretion in denying leave under 28 U.S.C. §2244(b)(3)(A) for the filing of a second petition for habeas corpus by Petitioners, who made a substantial showing that their new claims satisfied the requirements of §2244(b)(2); and that they are actually innocent, that their convictions resulted from more than sixty constitutional errors, and that but for constitutional error no reasonable factfinder would have found them guilty of the underlying offense.

PARTIES TO THE PROCEEDING

Hon. James M. LeBlanc, Warden
Dixon Correctional Institute

Hon. Richard Ieyoub,
Attorney General of the State of Louisiana

Hon. J. Phil Haney[1]
District Attorney
16th Judicial District Court
State of Louisiana

Because Petitioners have called into question the constitutionality of 28 U.S.C. §2244, 28 U.S.C. §2403(a) may be applicable, and the notification required by Rule 29.4(b) of this Court's rules has been made.

[1] Although not technically a party to the proceedings in the 5th Circuit, the District Attorney of the 16th Judicial District Court, in which petitioners were convicted in 1976, has filed responsive pleadings in every proceeding instituted by Petitioners since their conviction, including the recent Motion for Leave to File Second Petition for Writ of Habeas Corpus.

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5. Denial of application for writ of habeas corpus, USDC (W.D.La. 1992); *affirmed*, *Granger v. Whitley*, 1 F. 3d 1238 (5th Cir. 5/13/93), *cert. denied*, 510 U.S. 950 (1993)
6. Denial of Application for postconviction relief, 16th JDC, 9/18/01, *writ denied*, Louisiana Supreme Court, 9/19/03
7. Denial of Motion for Leave to File Second Petition for Habeas Corpus, U.S. 5th Circuit Court of Appeals, 11/5/03

STATEMENT OF JURISDICTION

Petitioners seek the issuance of a writ of habeas corpus under 28 U.S.C. §2241.

Having exhausted all state remedies, Petitioners sought to file a petition in federal district court under 28 U.S.C. §2254. As required by 28 U.S.C. §2244(b)(3), they moved in the Fifth Circuit Court of Appeals for an order authorizing the district court's consideration of their application. On November 5, 2003, the Fifth Circuit denied their motion. §2244(b)(3)(E) prohibits an application for rehearing or for a writ of certiorari. The Act does not, however, preclude this Court from entertaining an application for habeas corpus relief. *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333 (1996). Petitioners cannot obtain relief from any other court.

APPLICABLE LAW (reproduced in appendix)

U.S. Constitution, Art. I, §9, cl. 2; 28 U.S.C. §§2241, 2244, and 2254.

INTRODUCTION

In September of 1976, Petitioners David Alexander and Harry Granger were convicted of a March, 1976 armed robbery committed by three other men, who went on to commit four more crimes before they were caught. Soon after the real robbers' apprehension in June, two of them confessed to the March robbery; one of them led police to the murder weapon. By then, it was too late for Petitioners. With no credible leads in the case, police had taken the word of an informant who was herself in desperate trouble with the law. She negotiated a deal whereby she would trade her impending incarceration for the innocent Petitioners' freedom.

The informant did not know Petitioners' names or anything else about them, nor did she know any details of the crime in which she allegedly participated. As a consequence, she gave the authorities a patently unbelievable story that could never have supported a prosecution. Therein lies the rub. By the time the real killers arrived on the scene trailing confessions and a smoking gun, the authorities had fabricated the evidence their worthless informant lacked, and had indicted Petitioners. The State was committed by its own criminal misconduct to Petitioners' prosecution.

To obtain Petitioners' convictions, the State committed an unparalleled sixty constitutional errors; and those who obtained Petitioners' convictions have treated their quest for vindication as a personal threat. The State has misrepresented the facts, suppressed exculpatory evidence, obstructed a sheriff's investigation, and committed fraud on every court examining the record. Having deceived prior courts into rejecting meritorious claims, the State relied on procedural bars to prevent consideration of constitutional errors so well documented in the present application that the State could not hope to defeat them on the merits.

The State district court rejected Petitioners' application without apparent consideration. It copied the State's objections verbatim. Either a reading of Petitioners' briefs or the barest twinge of caution might have saved the court from statements like "counsel must have acquired all the information they needed about this case [from] the sheriff's investigative files." (App. 6, p. 9). Wrong, said the sheriff in a rebutting affidavit: his files were ransacked and burglarized, and he was denied access to the DA's case files. The district court's reasons amounted to nothing more than argument, fallacious and sometimes treacherous, and in every instance defeated by an unread record.

The Louisiana Supreme Court denied writs, and the United States Fifth Circuit Court of Appeals denied Petitioners access to the federal district court for a petition under 28 U.S.C. §2254. On the record submitted by Petitioners to the Fifth Circuit, their failure to satisfy the statutory requirements suggests a bar placed higher than any applicant could vault.

This application for an original writ of habeas corpus under 28 U.S.C. §2241 presents the last opportunity for a court to free these innocent men and condemn the affronts to the Constitution by which they have been unlawfully held.

STATEMENT OF THE CASE

A. THE CRIME FACTS

On March 30, 1976, Preston Demouchet and Jerry Paul Francis, men with violent criminal records, robbed the Hasty Mart convenience store in rural New Iberia, Louisiana, and fatally shot its elderly sole proprietor, Louis Gladu. Malcolm Roy drove the getaway car. Shocked by the killing, Roy dropped off the team, and Demouchet and Francis laid low for nearly six weeks. On May 10, 1976, Demouchet and Francis resumed their crime spree with the robbery and killing of another elderly sole proprietor in a hardware store in nearby Rayne, Louisiana. Later that month, they robbed another convenience store in nearby Jeannerette, Louisiana, and a man on the streets of New Iberia. On May 26, 1976,

they robbed and fatally shot a lone bank teller at a small branch in nearby Parks, Louisiana.

The last crime brought in the FBI, who pursued Demouchet and Francis to Houston, Texas, arrested them, and returned them to Louisiana for prosecution by state authorities. Within days of his return, Francis confessed to the entire string of crimes. He also led deputies to a .32 Clerke revolver. Ballistics tests confirmed its use in the Hasty Mart murder. Francis named Roy as an accomplice in the Hasty Mart crime. When deputies picked Roy up, he promptly confessed. Neither Demouchet, Francis, nor Roy was ever charged in connection with the Hasty Mart crime.

A week after the murder at the Hasty Mart, the small community of New Iberia was in a state of fear and agitation over the crime. The only known facts were particularly disturbing in that place and time: Mr. Gladu, a white man, had been shot and killed by several blacks, seen by witnesses speeding away from the scene in a blue car. The sheriff was under intense pressure to make an arrest. He passed it on to his deputies, who shook down the black community for any information it might provide.

On April 5, 1976, Mary Arceneaux, a black woman, told police that she had gone to the Hasty Mart on March 30th with three black men, who robbed the store while she waited in the car. She ultimately identified David Alexander, Harry Granger, and Herbert Derouen as her accomplices. Herbert Derouen, who has an I.Q. of 67, was arrested that night and subjected to an abusive all-night interrogation. He confessed the following morning, and identified Ronald Miller and René Jackson, another retarded man, as his companions; he said his group rode to the store in Miller's car. Derouen's jump from the Arceneaux vehicle left an empty seat in Arceneaux's carload of four. A few days later, she identified John Nelson Collins as the fourth person in the car with her.

On May 10, 1976, the authorities indicted Petitioners Alexander and Granger, along with Arceneaux, Derouen, Miller, Collins, and Jackson for armed robbery and first degree murder. By tragic coincidence, the grand jury indictments came down on the same day Demouchet and Francis

committed their second, near-identical robbery of a shopkeeper, whom they killed with the same gun. However, by the time the authorities received clear evidence that they had the wrong men in custody, they were committed to the prosecution.

B. PROSECUTORIAL MISCONDUCT AND THE TRIAL TESTIMONY

The means by which the State obtained convictions against these innocent men makes the prosecutorial misconduct of *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555 (1995), look like child's play. The petition that Petitioners proposed to file in federal district court detailed more than sixty constitutional violations. If the tainted evidence were excised from the record, no reasonable factfinder would convict Petitioners. Indeed, there would be no evidence linking Petitioners to the crime.

Petitioners went to trial on charges of armed robbery[2] in September of 1976. The charges against Collins, Miller, and Jackson were severed for later disposition. At trial, the State relied principally on the testimony of Mary Arceneaux and Herbert Derouen, who testified that they were with Petitioners on the night of March 29th when they planned the crime, and on the following day when they executed it.

The State concealed critical facts about their star witnesses. Arceneaux had 20 prior convictions, and new charges were pending against her. Indeed, shortly before she emerged as an informant, she had absconded from active probation, and a warrant was outstanding for her arrest. She had only three weeks left to pay restitution to one of her victims. In exchange for Arceneaux's testimony against Petitioners, the State recalled the warrant; dropped the pending charges; paid Arceneaux's restitution; and paid Arceneaux directly to keep her out of further trouble until

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[2] *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001 (1976), invalidated Louisiana's death penalty on July 2, 1976.

trial. At trial, Arceneaux perjured herself by declaring that she had only one prior conviction and that she had come forward voluntarily and without inducement, simply because she couldn't live with Mr. Gladu's murder.

Arceneaux's initial statement to the police, concealed from the defense, revealed that she knew next to nothing about the crime and nothing about her alleged companions, including their first or last names. This profound ignorance extended even to Petitioner Alexander, whom Arceneaux claimed to have been dating for 14 months. Before settling on the men the State indicted on the basis of Arceneaux's identifications, she falsely identified at least three others.

The series of false arrests began with the State's second star witness, Herbert Derouen. Arceneaux initially picked a photograph of *Sammy* Derouen out of a mug shot book and named him as an accomplice. Police mistakenly arrested his retarded brother *Herbert*. After an all-night interrogation and a slap across the face, Herbert confessed. Only then did police realize their mistake, at which point Arceneaux identified *Herbert*, not Sammy, as her partner in crime.

Derouen gave pretrial statements, also concealed from the defense, which were at sharp odds with one another, with Arceneaux's statements, and with his trial testimony. For starters, Derouen took himself out of Petitioner Alexander's car and said that he had committed the crime with two other men altogether, Ronald Miller, a 30-year-old college-educated cab driver, with no criminal history, and René Jackson, another retarded man. Because Derouen's move into the Miller cab left a vacancy in Alexander's car, Arceneaux picked yet another man, John Nelson Collins, as a co-perpetrator. The initial cast of four had grown to seven.

The wildly inconsistent initial statements of Arceneaux and Derouen came much closer together at trial, strongly suggesting that the State suborned perjury by both to create a credible synchronicity. For example, in their initial statements, neither witness mentioned a pre-crime planning session. In Derouen's April 19th interview with the prosecutor, he adverted to a pre-crime rendezvous but insisted that Arceneaux wasn't there. After unsuccessfully pursuing this

line of questioning for some time, the prosecutor had the following typical colloquy with Derouen:

> Q. And you didn't see Mary Arceneaux that night at all?
>
> A. No, I didn't see her that night.
>
> Q. You weren't standing on the street around one of those bars when Bro [Alexander] drove up in his car?
>
> A. No. I didn't know Bro had a car.

At trial, both witnesses would testify to the planning session, and each would relate seeing the other – and "Bro's" car.

The State relied heavily on alleged independent corroboration of its principal witnesses' testimony as proof of their credibility. For Arceneaux, the corroboration came from Mrs. Abney, who lived across the street from the Hasty Mart and testified that she saw a blue car turn around in her driveway near the time of the crime. At trial, she identified Alexander's Buick as the car she'd seen. A concealed pretrial statement by Mrs. Abney, however, indicated that she was an unreliable witness. Indeed, the State went to extraordinary lengths to suppress exculpatory evidence about the car. A police report described the getaway car as "light" blue. Petitioner Alexander's Buick was midnight blue; Malcolm Roy's brother's LeMans was a lighter blue. Police impounded at least one other blue car, allegedly based on information provided by defendant Jackson. Police also told Daniel Tharpe, one of Arceneaux's falsely identified suspects, that they believed his mother's blue car had been used in the crime.

Katherine Eldridge, who discovered Mr. Gladu's body, told police that she had seen a blue car in the Abney driveway and a second blue car speeding away from the scene. Deputies pressured her to identify Alexander's Buick. Eldridge told them she was certain that the Buick was not one of the cars she'd seen. The deputies then told this visibly fragile witness that they were going to get the car identification from Arceneaux, that an innocent witness like her wouldn't be safe in such a role, that the defendants were

dangerous, and that she should not mention seeing a car. At trial, she testified that she had seen no other cars.

Unknown to the defense, police found tire imprints in the Abney driveway, which they strongly suspected belonged to the robbery vehicle. They made plaster casts, and later tested them against Alexander's car. They didn't match. Police either did not make the tire comparison to the Roy LeMans or suppressed the results. They did not disclose the existence of the plaster casts to the defense, and later destroyed the casts. At trial, the defense had no basis on which to challenge the testimony of Arceneaux and Abney that Alexander's Buick was the robbery vehicle.

In corroboration of Derouen's testimony, the State offered the testimony of one Paul Arcement, who related that he stopped by the Hasty Mart on the night of March 29, 1976. He said that he saw another car parked there, that he saw its headlights flash, and that two men then exited the store. One of those men, he said, looked like Petitioner Granger. Arcement's two pretrial statements, which the State suppressed, were sharply inconsistent. So were Derouen's. In his April 19th statement, he said that the men drove by the store but did not stop. At trial, consistent with Arcement's testimony, Derouen testified that they stopped at the store and Granger went inside, exiting when another car pulled up and Miller flashed his lights. The two witnesses' progression toward synchronicity, perfected only at trial, is difficult to explain by any means other than State-suborned perjury.

Long before trial, the State determined that Arceneaux was, in the words of its own investigator, a "pathological liar." As an example of her patent lies, Arceneaux said in her initial statement that "Harold" (David Alexander) picked her up at "a little around dusk" for the robbery that occurred shortly before 3 p.m. Deputy Comeaux told her it must have been noon, and noon it became at trial. Asked what time Alexander brought her home the night before the crime, she said it was early because she wanted to get home before her mother. Moments later, Arceneaux said that her mother was dead.

Understandably suspicious of Arceneaux's account, police pressed her to help them locate the murder weapon. She first told them it was buried at Cypress Island. When hours of digging produced no results, Arceneaux changed her story and placed the gun first in the hands of a man whom police discovered to be Arceneaux's real boyfriend, and then at the home of one Emily Wiltz. In the end – at least, until Francis easily led them to the gun – the deputies accepted Arceneaux's claim that Petitioners threw the weapon into the water at Cypress Island. She dropped that allegation at trial.

On May 12, 1976, the State fabricated a confession allegedly made by Petitioner Alexander to cell-mate Andrus Wilson. The proof of the fabrication lies in the statement itself, which asserts that Alexander admitted throwing the gun into the water at Cypress Island. That couldn't have been true, because Demouchet and Francis would use the weapon in four more crimes. More importantly, at the time Wilson's statement was crafted, the deputies were the only ones who believed the gun was lost at Cypress Island. Called to the stand at trial to relate the alleged confession, Wilson refused to testify.

The murder weapon posed one of the greatest difficulties for the prosecution. Deputy Comeaux, head of the investigation, testified that Francis led them to a .32 Clerke. A ballistics examiner confirmed it as the lethal weapon. Comeaux acknowledged that on July 1st Francis admitted to committing the Hasty Mart crime, but he testified that Francis retracted his statement a week later and said that his confession had been prompted by a bribe from defendant Collins' mother. Comeaux perjured himself by stating he did not recall whether Francis had given any other statements. In fact, Francis had made at least three other inculpatory statements which undermined the State's bribery theory.

In the State's theory, Demouchet lent the .32 Clerke to Petitioner Alexander a week before the Hasty Mart crime and retrieved it two days after. Pretrial statements by Demouchet and Francis, which the State suppressed, indicated that the gun-swap was a State fabrication. At trial, the

State called Demouchet to testify to the alleged exchange of the gun. Demouchet admitted making a statement to that effect, but said that Deputy Comeaux had given him the "story." He had come to court, Demouchet said, to clear Alexander, who had never gotten a gun from him.

After the Demouchet debacle, the prosecutor put Francis on the stand. Francis asserted his Fifth Amendment privilege against self-incrimination. The prosecutor, through questions posed to the silent witness, reviewed at length its theory of the gun swap and Francis's bribery-induced confession. With that, the State rested.

Petitioner Alexander testified that he had been driving his cab at the time of the robbery, a fact that one of his passengers tried to confirm; under cross-examination she faltered in her certainty of the date. Roy testified for the defense that he drove Demouchet and Francis to the Hasty Mart in his brother's blue LeMans. He said that he waited outside while the pair went in, that they came out running, that Demouchet had a gun, bills, and blood on his hands, and that Francis had a sack of change. After his arrest, Roy said, he admitted to the crime, but the Sheriff, the prosecutor, the D.A.'s investigator, and the chief criminal deputy all came into the room, and told him they didn't believe him. Under pressure from them, he said, he signed a second signed statement, declaring that his confession was false. He had implicated himself, the second statement declared, because his wife had said that she wished he would go to the penitentiary and he saw his confession as a means to achieve that end. The authorities, Roy testified at trial, were dissatisfied with this reasoning. At the end of the day, Roy signed a third statement, again declaring that the first was false, and now assigning as his reason for self-incrimination an offer by Petitioner Alexander's father to pay him $45,000 for taking the rap.[3]

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[3] Roy confessed and retracted his confessions on July 6, 1976. On the following day, Jerry Paul Francis, too, retracted his earlier confession. Roy

(Continued on following page)

The prosecutor impeached Roy's credibility by reviewing his sequence of conflicting statements and by ridiculing his claim that the authorities coerced him to lie by saying they would lock him up unless he declared his innocence.

The jury convicted Petitioners by a vote of 10 to 2. They were subsequently sentenced to serve terms of 99 years at hard labor – of which they have served 27.

Prior to Petitioners' trial, the State offered Miller and Collins immunity in exchange for their testimony against Petitioners. Miller and Collins steadfastly refused. After Petitioners' convictions, however, the men agreed to plead guilty to acting as accessories, for which they would serve little more than a year in prison. The State charged Roy with perjury,[4] and considering himself lucky not to be charged with murder, he pleaded guilty to receive a lesser sentence. The State dismissed all charges against René Jackson.

C. PETITIONERS' DISCOVERY OF THE STATE'S MISDEEDS

In 1983 Errol Romero, newly-elected sheriff of Iberia Parish, fired most of the deputies involved in the Hasty Mart investigation and agreed to reopen the case. Ronald Lauland, an investigator hired by the Alexanders to assist in the effort, began by seeking access to the case files. He met a brick wall in the DA's office, which refused to cooperate in any way and conducted an active surveillance of his activities.

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said he was offered $*45,000* by Petitioner Alexander's father. Francis said he was offered $*4500* by defendant Collins' mother.

[4] The State charged Roy before trial, as soon as it learned that he intended to testify for the defense. The charge: swearing out a false police report. The "false report" was Roy's first signed statement of July 6, 2003, in which he claimed to have participated in the crime. Roy had been incarcerated for more than a week when he testified for the defense at trial.

Sheriff Romero was fully cooperative with Lauland, but early in the reinvestigation, his files were stolen. Although the boxes mysteriously reappeared, the Sheriff had no means of knowing what might be missing. He, too, requested access to the DA's files and was rebuffed.

In 1985 Mary Arceneaux, then living in Baton Rouge, offered to solve a notorious string of local robberies in exchange for help with new charges pending against her. By extraordinary coincidence, the head of the armed robbery division was Steve Woodring, a former Iberia Parish deputy who had worked on the Hasty Mart investigation. The alert policeman recognized Arceneaux. After her new information proved completely bogus, he questioned her about the Hasty Mart crime, and she admitted that she had made up every fact not supplied to her by her handlers. Woodring turned Arceneaux's recantation over to Sheriff Romero, along with his personal knowledge of the State's payments to her, her identification of Sammy Derouen, the chase after the weapon at Cypress Island, and Derouen's unconstitutional interrogation.

In the meanwhile, Lauland had extracted a recantation from Derouen as well. Sheriff Romero shared all of these discoveries with the DA's office, and proposed a joint interrogation of Derouen. The prosecutor responded favorably to the suggestion, but immediately sent Comeaux, posing as a deputy, to pick up the retarded man. Comeaux and the prosecutor conducted a private interrogation of Derouen, at the conclusion of which he signed a statement attesting to the accuracy of his trial testimony.

Sheriff Romero's office prepared affidavits charging former deputies Desormeaux, Comeaux, and Moore with criminal misconduct in the Hasty Mart investigation. The prosecutor advised that his office would not accept the charges because they had allegedly prescribed.

In December of 1985, former sheriff Wattigny and former deputies Comeaux and Moore sued Sheriff Romero for alleged defamation, seeking millions of dollars in damages. The suit brought Sheriff Romero's investigation to a screeching halt – as it was almost certainly intended to do.

At about this time, Petitioners retained new counsel, Mr. Alva Brumfield. In February of 1986, Mr. Brumfield filed Petitioners' first application for post-conviction relief. The petition was based upon all of the information uncovered by that time, the Arceneaux and Derouen recantations, Wilson's statement that the State had coerced him into falsifying Alexander's confession, and the information provided by Woodring about payments to Arceneaux, her identification of Sammy Derouen, and the Cypress Island hunt for the gun. Mr. Brumfield took the case to the press, and the plaintiffs in the civil action swiftly retaliated.

Because legal privilege protected Mr. Brumfield, the plaintiffs sued Lauland, claiming that he'd "misled" Brumfield; others who supported Petitioners were likewise sued: news organizations, for reporting on the story; Arceneaux and Derouen, for alleging that the State induced them to perjure themselves; and Petitioners, for protesting their innocence. Brumfield took up Lauland's and Petitioners' representation in the civil defamation action.

The State countered Petitioners' 1986 application for post-conviction relief with a string of falsehoods. It characterized Woodring's report, which it knew to be true, as a "nebulous and unsubstantiated bit of hearsay." The claim of payments to Arceneaux it described as "fantasy."[5] It dismissed Wilson's affidavit as "immaterial" because he had refused to testify; but it went on to introduce a former deputy's contravening affidavit as evidence of the "blatant falsity" of Wilson's claim. As for Arceneaux's recantation, the

[5] The State admitted for the first time (because Sheriff Romero could prove it) that the DA's office had paid restitution to one of Arceneaux's victims. It claimed to have done so without Arceneaux's knowledge, because she, allegedly as a result of her cooperation with the State, had been unable to obtain any employment post-trial. The State well knew that Arceneaux had never been gainfully employed. The act of restitution, the State alleged, must have led to Petitioners' "misunderstanding" about payments to Arceneaux.

State claimed that her "character . . . obviously has deteriorated in the intervening years, rendering her current recantations absolutely incredible." The State noted that she had accumulated four felony convictions in the past ten years – overlooking the *twenty* convictions she'd racked up before trial and her perjury on that very subject. It also noted that Arceneaux's videotaped recantation was "replete with obvious and outrageous impossibilities and anachronisms." True to form, in her taped interview Arceneaux rattled off the same sort of gibberish that filled her pretrial statements. However, with the shameless effrontery that has marked the State's conduct throughout these proceedings, the prosecutor informed the court that Arceneaux's "trial testimony was consistent with her initial statements to law enforcement officers." In support of this allegation, the State offered an affidavit by former deputy Moore, who had carried the State's payments to Arceneaux and who was a plaintiff in the civil suit. Because Petitioners had not yet seen Arceneaux's pretrial statement, with its wacky assertions about going home early so as not to worry her dead mother, they couldn't refute the State's outright lie.

As to Derouen's recantation, the State claimed that the credibility of his trial testimony was demonstrated both by the re-recantation (which the State had obtained by falsely arresting the man) and by the fact that "Derouen's [pretrial] statement was consistent with his testimony at trial." Again, the State supported its allegation of consistency not with the pretrial statements themselves, which were grossly inconsistent, but with a false affidavit provided by another former deputy.

With respect to both recantations, the State contended that the witnesses had withstood "sharp cross-examination" by the defense and had been independently corroborated. Only the State knew the breadth of these lies, as it still concealed the evidence that might have fueled truly withering cross-examinations, as well as evidence demonstrating that the corroboration was falsified.

The trial court denied Petitioners' application, adopting all of the State's false arguments in its reasons for judgment.

See, App. 3. On June 20, 1986, the Louisiana Supreme Court denied writs. *State ex rel. Alexander v. Blackburn*, 489 So. 2d 1275 (La.), *recon. denied*, 492 So. 2d 1211 (La. 1986).

Although the writ was lost and the sheriff's investigation had been halted, Mr. Brumfield actively pursued discovery in the civil action. He wasn't allowed to go on a "fishing expedition" into the State's files, and he didn't even get everything the judge ordered. But the civil litigants took numerous depositions, and obtained transcripts of Arceneaux's April 5, 1976 statement, of Derouen's April 6, 1976 statement, and voluminous contemporaneous reports of the investigation, which revealed: other inconsistent statements by these witnesses and by Jackson, Abney, and Arcement; the authorities' misgivings about their witnesses' credibility; and the statement of Andrus Wilson. They took the deposition of Eldridge, who reported the exculpatory facts she had disclosed to the State and the deputies' pressure on her to conceal those facts.

These crucial discoveries came after Petitioners' writ was denied. Several months after exhausting state postconviction remedies, Brumfield wrote to Petitioners that "many additional facts are coming out." When the defamation suit was concluded, he said, "we plan on moving forward with the post conviction application . . . " The defamation suit did not conclude until November 16, 1989,[6] however, seven months after Mr. Brumfield died. His brother, who took over the files, also died before the action ended.

In 1990, attorney Charles Calahan assumed Petitioners' representation. As a law student, Calahan had volunteered his time to Brumfield. But Brumfield feared that Calahan was a State-planted spy and therefore had not freely shared information with his young volunteer. When Calahan signed on as Petitioners' counsel, then, he had to develop the case

[6] The case was settled. Although Sheriff Romero and his counsel wanted to try the case, the media defendants arrived at a settlement in which they would pay only the plaintiffs' attorneys' fees and costs.

file anew. He obtained some records from Brumfield's estate, but the files had been moved several times, were in great disarray, and were clearly incomplete. Most of Calahan's information came from the public record. Handling the case on a *pro bono* basis while establishing a new law practice, he had neither the time nor the resources to read the entire record in *Moore v. Romero*, which ran to the thousands of pages. Like his predecessors, Mr. Calahan got no help from the DA's office.

In 1990, Mr. Calahan filed a second application for post-conviction relief. He asserted again that Arceneaux and Derouen had perjured themselves at trial. The State replied that the "issue has previously been thoroughly explored and decided against them." The district court agreed. *See*, App. 4. Mr. Calahan, now possessed of the text of the Wilson statement, containing the telling allegation that the gun was thrown into the water at Cypress island, also complained of the State's "egregious misconduct" in attempting to frame Petitioners with perjured testimony. The State repeated its contention that the issue was irrelevant because of Wilson's failure to testify at trial, and took deep offense at the "profoundly serious accusation," which it claimed was "based upon free-floating speculation that borders on fantasy." The court ruled that the claim was unfounded and raised no constitutional issues.

Mr. Calahan also complained of the State's bad faith pretrial notice to the defense that Francis's confession had been thoroughly checked out and its falsity established. Based on police reports discovered in the civil litigation, Mr. Calahan was now able to point to the crime-specific details which verified Francis's statement. The prosecutor replied that his disclosure to the defense merely represented his "own opinion" of Francis's confession – as if a materially false opinion, posing as fact, created no constitutional issue.

Mr. Calahan also asserted that, in notifying the defense that the .32 Clerke which killed Mr. Gladu had been used in four other crimes, the State must have been relying upon undisclosed information from Francis. The prosecutor called the assertion a "particularly egregious error." In point of fact,

Mr. Calahan's speculation was absolutely correct, but Petitioners would not discover the crucial Francis statement until shortly before filing the present application in state court, as discussed in Part III, *infra*. Relying on the State's false argument, however, the court rejected the claim.

Mr. Calahan's petition also raised the argument, based on evidence uncovered in the civil litigation, that the State failed to disclose its possession of tire casts from the Abney driveway that didn't match Alexander's tires. In response, the prosecutor launched a lengthy and deceitful argument which at best went to the weight of this important evidence but had no reasonable bearing on his failure to disclose it. The trial court dismissed the claim as lacking substantive merit and as being procedurally barred due to Petitioners' failure to include it in their 1986 application (before they'd uncovered the information).

In conclusion, the district court rejected all of Petitioners' claims as "old hash,"[7] App. 4, and the Louisiana Supreme Court denied writs, 573 So. 2d 1141 (La. 1991), *recon. denied*, 576 So. 2d 23.

Mr. Calahan took the case to federal court. He asserted only one new claim pertinent here: the alleged insufficiency of the evidence. In a lengthy report, the magistrate dismissed all claims, persuaded by the State's arguments that the evidence against Petitioners was "overwhelming." App. 5. Petitioners still lacked the means of demonstrating that the "overwhelming" evidence was also perjured. The district court adopted the magistrate's report, 3/12/92; Affirmed, *Granger v. Whitley*, 1 F. 3d 1238 (5th Cir.), *cert. denied*, 510 U.S. 950 (1993).

In 1996 Centurion Ministries, a nonprofit organization dedicated to freeing the imprisoned innocent, assigned an

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[7] Mr. Calahan raised other arguments which have no relevance here because Petitioners are not reasserting them: ineffective assistance of counsel; improper argument; and suggestive identification procedures.

investigator to the case. Between June of 1996 and August of 1999, the investigator spent 329 days in the field. This effort produced a mountain of exculpatory evidence, presented in the application filed in state court on September, 1999. The district court denied the application on September 18, 2001, copying the State's brief as his reasons for judgment. The Louisiana Supreme Court denied writs on September 19, 2003, with two justices dissenting. On November 5, 2003, the Fifth Circuit Court of Appeals denied Petitioners' motion for consideration by a federal district court.

ARGUMENT

I. THE BAR AGAINST REASSERTING THE SAME CLAIM

28 U.S.C. §2244(b)(1) provides that a claim presented in a successive §2254 application "that was presented in a prior application shall be dismissed."

Many of Petitioners' claims are repetitions of claims asserted previously. Petitioners argued to the Fifth Circuit that fairness required consideration of claims the courts were duped into rejecting, but the court did not address the issue.

As an example of the wrongly-defeated claims, Petitioners asserted in prior applications that the State paid Arceneaux for her testimony, concealed that fact, and adduced a perjured denial of any inducements. In their 1986 application Petitioners also argued that Arceneaux's false lead to Cypress Island was a fact supporting the credibility of her recantation of her trial testimony. Petitioners relied upon the Woodring affidavit to support both claims. The State denied the truth of Woodring's account and urged that it be dismissed as unsubstantiated. The courts accepted the State's arguments. Petitioners' present application offers a wealth of new evidence substantiating both claims.

The State's false denials in post-conviction proceedings of exculpatory facts it knew to be true constituted a fraud on the courts. *See*, *First National Bank of Louisville v. Lust*, 96 F. 3d 1554, 1573 (5th Cir. 1996). Such fraud "call[s] into

question the very legitimacy of the judgment[s]" on Petitioners' previous applications. *See*, *Calderon v. Thompson*, 523 U.S. 538, 118 S. Ct. 1489, 1502 (1998).

A determination that the State's fraud vitiated the prior rulings on the subject claims would undercut a finding that those claims were in fact "presented in a prior application," within the meaning of §2244(b)(1). A claim on which no valid ruling was ever entered should, as a matter of statutory interpretation, lose its repetitive status, so that the Petitioner could assert it as a new claim under ¶(b)(2). In that case, the "factual predicate for the claim" would be the newly-discovered evidence of the State's fraud.

As this Court declared in *Schlup v. Delo*, 115 S. Ct. at 861, a petitioner "should be allowed to pass through the gateway and argue the merits of his constitutional claims" if his evidence of innocence is so strong "that a court cannot have confidence in the outcome of the trial." §2244(b)(2) specifically allows consideration of *new* claims supporting a clear and convincing case of innocence. *Felker v. Turpin*, 116 S. Ct. 2333, 2340 (1996), ruled that the AEDPA's restrictions on *new-claim* successive petitions passed muster under the Suspension Clause, U.S. Const. Art. I, §9, cl. 2, because they were "well within the compass" of "the complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." The Court noted that the new-claim provisions carry forward equitable principles allowing such claims in extraordinary circumstances, such as a convincing showing of actual innocence.

By contrast, the *same-claim* provision, §2244(b)(1), did not import any of the equitable principles applicable in the pre-AEDPA law, and so moved substantially beyond the compass of the pre-existing law to suspend the writ for certain same-claim applications. In a case such as this, where Petitioners have made a clear and convincing showing of actual innocence, based in part on repetitive claims fraudulently defeated by the State, the statutory bar poses a serious constitutional issue that *Felker* did not address. If this Court cannot loosen the restriction of §2244(b)(1) by way

of statutory interpretation, Petitioners urge the Court to declare the provision unconstitutional.

II. THE TIME LIMITATION

Petitioners' tolling date for the one-year time limitation of 28 U.S.C. §2244(d)(1) runs from:

* * *

B) the date on which the impediment to filing an application created by State action in violation of the constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; * * * or

* * *

D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

A threshold question is whether a different limitation period applies to each *claim* in an application presenting multiple claims, or whether a single period applies to the entire *application*. The language of the provision supports the latter rule, in stating that "A 1-year period of limitation shall apply to an *application*. . . . " §2244(d)(1) (emphasis supplied). In construing a statute, courts are to give effect, if possible, to every word Congress used. *Reiter v. Sonotone*, 442 U.S. 330, 339, 99 S. Ct. 2326, 2331 (1979). By referring to the limitation applicable to an "application" instead of to a "claim," Congress indicated that a single limitation period would apply to all claims asserted in a particular application.

The Act further states that "[t]he limitation period shall run from the *latest* of" the triggering events listed. *Id.* (emphasis supplied). This suggests that for Petitioners' application the one-year period ran from the date on which the *last* of the impediments to their filing was removed or the date on which the *last* factual predicate of a claim was uncovered through the exercise of due diligence. This case illustrates the sensibleness of such an interpretation. Centurion Ministries' investigator ran down leads about State misdeeds on each of his trips to Louisiana. Between 1996 and 1999, he made 26 trips to Louisiana and spent 329 days

in the field. If §2244(d)(1) required Petitioners to file each *claim* within a year of the discovery of the predicate facts, the investigator would have been forced to concentrate on each lead until he had exhausted it, in order to permit counsel to file the claim it supported. In order to file each of Petitioners' claims within a year of the discovery of the predicate facts, undersigned counsel would have been forced to file multiple *applications*, leading to a piecemeal litigation of claims that would have severely taxed the system and accomplished nothing in terms of discouraging abuse of the writ. The present application, combining all known claims, affords the court the opportunity to examine the claims as a whole, in the only efficient manner that can yield a fair adjudication.

The question remains, however, when the time limitation began to run for various claims. For example, with respect to the claim arising out of Arceneaux's chase after the murder weapon, Petitioners learned the facts from Woodring in 1985, but the State's deceit caused the courts to reject the issue. Petitioners could not prove the State had misled the courts until they made their 1998 discovery of Arceneaux's previously concealed statement. Within a year of that discovery, Petitioners filed the present application in state court. In response, the State had the temerity to contend that the claim was procedurally barred because the factual predicate for the claim had been "long known." The state courts, which accepted all of State's contentions, agreed. The Fifth Circuit did not reach the issue.

Technically speaking, the facts of the claim were known, but the State cannot fairly prevail in such a contention after persuading the courts that the "known" facts were untrue. Consideration of the claims would be authorized by:

1) a finding under ¶B that the State's deceptions constituted an "impediment" to Petitioners' filing a meaningful application; or

2) a finding, under ¶D that the "factual predicate" of a claim cannot be discovered through the exercise of due diligence so long as the State falsely denies the facts and conceals evidence of them.

By either of these statutory constructions, a host of Petitioners' valid claims, wrongly dismissed because of the State's falsehoods, could receive a fair hearing. A ruling that Petitioners' claims are time-barred would do nothing to discourage an applicant's abuse of the writ, for these Petitioners are guilty of none; it would simply reward the State for its deceptions.

Alternatively, because the time limitation is a statutory rule rather than a jurisdictional requirement, it may be subject to equitable tolling in extraordinary cases. *Wyzykowski v. Department of Corrections*, 226 F. 3d 1213 (11th Cir. 2000); *Calderon v. U.S. District Court for the Central District of California*, 128 F. 3d 1283 (9th Cir. 1997), *cert. den.*, 522 U.S. 1099, 118 S. Ct. 899; *Tinker v. Moore*, 255 F. 3d 1331, 1333-1334 (11th Cir.), *cert. den.* 534 U.S. 1144, 122 S. Ct. 1101 (2001); *Miller v. Marr*, 141 F. 3d 976 (10th Cir.), *cert. den.* 525 U.S. 891, 119 S. Ct. 210 (1998). Petitioners' innocence and the State's fraud combine to warrant a lifting of the time bar.

If statutory construction cannot lift the time bar for such claims, Petitioners urge this Court to declare §2244(d) unconstitutional, for it represents a departure from prior procedural law that amounts to a suspension of the writ. Before the AEDPA's enactment in 1996, the timing of a petitioner's application might arouse inquiry under *Sanders v. United States*, 373 U.S. 1, 18, 83 S. Ct. 1069, 1078 (1963), which prohibited abuse of the writ. In all cases, however, the court admonished that "the federal judge clearly has the power– and, if the ends of justice demand, the duty – to reach the merits." *Sanders*, 83 S. Ct. at 1079.

The inflexible one-year time limitation is not within the compass of established principles to the extent that it bars consideration of a claim delayed through no fault of the petitioner and warranting consideration in the interests of justice. Such an obstacle would amount to an unconstitutional suspension of the writ. *Felker v. Turpin*, *supra*, did not reach the question.

III. THE FIFTH CIRCUIT'S DENIAL OF PETITIONERS' MOTION

Although Petitioners argued to the Fifth Circuit that all their claims merited consideration, they highlighted five new claims, which, in Petitioners' view, satisfied the requirements of §2244(b)(2) that:

> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The Fifth Circuit ruled, without explanation, that Petitioners had not demonstrated compliance with either requirement. App. p. 192. It could only have derived such a conclusion from reference to the state district court's Reasons, which, as noted above, were simply a re-formatted copy of the State's brief. Significantly, the Reasons copied the State's briefs filed *before Petitioners filed their rebuttal brief and exhibits.*

Among Petitioners' new exhibits were affidavits from their former investigator, Lauland, from their former attorneys, O'Neill and Calahan, and by the former Sheriff of Iberia Parish, Romero, detailing their own ignorance of the new exculpatory materials, the State's refusal to allow access to its files, and its outright resistance to their efforts to uncover the truth. Parroting the State, the district court said, for example: "Petitioners have made absolutely no effort to show that their very first post-trial lawyer, Philip O'Neill, lacked knowledge of the material on which they base this claim for relief . . . ;" the State extended "positive cooperation" to Mr. Brumfield's investigation; and "counsel must have acquired all the information they needed [from] the sheriff's investigative files." (App. pp. 121, 122). Each of these statements was soundly refuted by affidavits to which the Reasons made no reference. The adjudication in state

court, then, clearly "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." Under 28 U.S.C. §2254(d), it was entitled to no deference whatsoever. The Fifth Circuit was led into plain error by its reliance on a decision written by the State without consideration of Petitioners' countervailing evidence.

The five new claims presented powerful evidence of the State's misconduct and of Petitioners' innocence:

1. **Arceneaux's 4/5/76 statement.** A portion of the initial statement made by Arceneaux was recovered in Sheriff Romero's investigation. However, the transcript concluded with the words, "Tape recorder is turned off here." In 1998, the State granted undersigned counsel access to its files, which had previously been closed to prior counsel, investigators, and Sheriff Romero himself. Undersigned counsel discovered a cassette recording of Arceneaux's statement and requested a copy. The tape provided by the State was of such poor quality that it had to be digitally enhanced by an audio engineer. Undersigned counsel received the translation in November of 1998, less than a year before filing Petitioners' application in State court, and discovered several new pages of text.

The newly-discovered segment of Arceneaux's statement – essentially a second full statement – is a *Brady* bombshell. Arceneaux agrees to take the deputies in search of the murder weapon she says Petitioners buried at Cypress Island. This hunt for a gun the true killers still had in their possession and would use in four more crimes was a telling indicator that Arceneaux was lying.

As noted above, in 1985 Woodring, a former Iberia Parish deputy, reported the Cypress Island fiasco as evidence of Arceneaux's inherent incredibility. Another factor listed by Woodring was Arceneaux's arbitrary selection of Collins as one of the alleged co-perpetrators of the crime, the man she said at trial was left behind at the scene of the crime. On the newly-discovered segment of transcript, however, Arceneaux said this man did not go to the robbery at all. And contrary to her assertion only moments earlier that she and Petitioner

Alexander had been romantically involved for 14 months, Arceneaux now declared that she and the Collins character were "like together, you dig?"

Without access to Arceneaux's interview, Petitioners' only evidence of these lies was Woodring's report. The State, *with knowledge of its truth, disclaimed it as "unsubstantiated."* Judge Johnson incorporated the State's false disclaimer into his reasons for denying the 1986 application. Giving "no further consideration" to Woodring's disturbing report, the court moved easily to conclude that "[t]he bare allegations contained in the [recanting] affidavit[ ] of ... Mary Arceneaux [are] unsupported by any indicia of reliability in the record." (App. pp. 38, 47). The missing indicia of reliability were in the untranscribed portion of Arceneaux's statement, buried deep in the State's files. The State's false argument to the court undermined the court's misinformed conclusions and emphasized the significance of the State's *Brady* violation in suppressing the second April 5th interview.

2. **Daniel Tharpe.** In 1999, Centurion Ministries' investigator located several men wrongly identified by Arceneaux as her accomplices. One of these men, Dan Tharpe, was arrested by deputies who told him that Arceneaux had identified him as a participant in the robbery. Tharpe and his mother insisted, to no avail, that they'd spent the afternoon of March 30, 1976, fishing from a bridge. Later, the bridge tender verified his alibi and Tharpe was released.

Arceneaux's misidentification of Tharpe was unknown to Petitioners until Centurion Ministries' investigator found a search warrant for the man's arrest and then tracked down Tharpe himself. The State argued, and the state court's Reasons agreed, that the defense "knew about Dan Mitchell Tharpe's possible involvement" from an obscure reference in an obscure report, and "ignored" the facts.

Petitioners' investigator Lauland obtained from Sheriff Romero's files a 1976 report by the DA's investigator, Tyler. Tyler related the questioning of one Dan *Mitchell*, who had provided a verifiable alibi. Dan Mitchell, as the Reasons noted, was undoubtedly Dan *Mitchell Tharpe*; but the Tyler

report said nothing about Arceneaux's identification of him as a suspect. The Tyler report did not give Messrs. Brumfield and Lauland enough information to prompt further investigation, and they never learned of Arceneaux's false identification.

3. **Derouen's 4/19/76 statement.** Undersigned counsel located a second untranscribed cassette in her examination of the previously closed State files, a recording of Herbert Derouen's April 19, 1976 interview with the prosecutor. The significance of this new piece of exculpatory evidence cannot be overstated. In the April 19th interview, less than a month after the crime, the retarded Derouen did not know the most basic details of the story he would tell at trial. For example, at trial, he testified that on the night before the crime, the perpetrators met to plan the event, then Petitioner Granger went inside the Hasty Mart. Derouen's testimony set the backdrop for Arcement to testify that he saw Granger at the store. In Derouen's April 19th statement, he testified contradictorily that Arceneaux wasn't there for the planning and that on the reconnaissance mission, *they didn't stop or go inside the store*. Petitioners' brief devoted more than thirty pages to the many wild gaps and claims in the April 19th statement, interspersed with the State's active coaching of its witness. The statement revealed that Derouen knew nothing more about the crime than what the authorities taught him.

4. **Francis's 6/30 statement.** In January of 1999, Centurion Ministries' investigator, going far beyond the exercise of due diligence, scoured the files of the DA of *Acadia* Parish[8], where Francis was prosecuted for one of his post-Hasty Mart crimes. There the investigator found a confession by Francis, which had been directed to the Sheriff of *Iberia* Parish but was nowhere to be found in the Iberia Parish records – even those opened to undersigned counsel. Discovered less than a year before Petitioners filed their new

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[8] Petitioners were prosecuted in Iberia Parish, where the records of their case were filed. Acadia Parish is outside 16th Judicial District Court.

application, Francis's June 30, 1976 confession is probably the most significant document uncovered to date.

Before trial, the State disclosed to defense counsel (only after the defense learned of it from Roy) Francis's July 1, 1976 confession to the Hasty Mart crime. In the State's theory, the July 1st confession was prompted by a bribe from co-defendant Collins' mother. According to the State, Francis knew he was going down for other crimes anyway, and so decided to help Petitioners out by taking the fall for the Hasty Mart crime, too. The June 30, 1976 statement utterly defeats the State's theory, because Francis confessed, apparently for the first time, to all five crimes.

The other bribery-crushing significance of the June 30th letter is that the State accepted as gospel truth Francis's description of four out of five of the crimes he listed. Indeed, the State *relied* on Francis's letter in advising Petitioners' trial counsel that the Hasty Mart weapon had also been used by Demouchet and Francis in four other crimes. The prosecutor, in that disclosure to the defense, revealed facts he *could not have gleaned from any other source*. No shots were fired in two of the robberies, and at that point in time, the ultimately fatal bank-robbery bullet was still lodged in the head of the comatose teller. The prosecutor only knew the same gun was used because Francis said so.

The fact that Francis had confessed, with unquestioned truthfulness, to four other crimes undercut not only the bribery theory but the State's claim that the "falsity" of Francis's statement had been "established." The **only** portion of the June 30th letter the State allegedly doubted was his confession to the Hasty Mart crime – for which he had provided the murder weapon and substantial detail corroborated by non-public evidence in the State's files.

5. **Other Francis statements.** Additionally, Centurion Ministries uncovered two other reports in the Acadia Parish records, indicating that Francis denied the State's gun-swap theory on June 23, 1976, and told Acadia Parish deputies on July 2, 1976 that "Preston [Demouchet] had already shot three people," including "the old man in New

Iberia." His confessions to the authorities of another jurisdiction could have had no possible benefit to Mrs. Collins' quest to clear her son of charges in Iberia. It could have had no possible motive, except to come clean. And it couldn't have followed the typed script that Mrs. Collins had supposedly provided for the illiterate Francis's July 1st confession, for in this statement Francis discussed only Demouchet's part in the killing. The inescapable conclusion to be drawn from Francis's July 2d statement is that he was simply, and freely, telling the truth. This conclusion is buttressed by Francis's series of confessions – a series far more compatible with the acknowledged guilt of five crimes than a bribe to take the fall for one.

Mr. Calahan, who drafted Petitioners' 1990 application for postconviction relief, correctly deduced that the State could only have learned of the gun's connection to all five crimes from Francis. But when he advanced the contention to the court, the State decried the argument as an ***"egregious error"***, saying that the weapon had been "immediately tested and its connection with all of the crimes in question spread like wildfire." No support was offered for this contention, and the record now shows that it was untrue.

Mr. Calahan's argument, then, was not erroneous at all, and the State had the proof of the argument it ridiculed. Yet in response to the new claim, submitting for the first time the statement whose existence the State *denied* in 1990, the prosecutor contended, "[t]he whole issue of Francis's many statements to various authorities" was settled in the 1990 proceedings. An issue "settled" on the strength of the State's bald-faced lie could not possibly have received due consideration. Nevertheless, the state court copied the State's argument into its Reasons.

The predicate facts were not discovered until Centurion Ministries unearthed Francis's June 23, June 30, and July 2, 1976 statements. Petitioners' application advanced for the first time the constitutional errors inhering in the concealment of the three critical statements to Acadia Parish deputies. It raised for the second time, but for the first time

with verification, claims relating to the suppression of the crime details corroborating Francis's confession; the false pretrial "disclosure" that the State had established the falsity of Francis's confession; and deputy Comeaux's perjured testimony at trial denying the existence of any other statements. These constitutional violations are among the most serious the State committed in its prosecution of Petitioners. Suppression of the core truth – that Petitioners were innocent and three other men were guilty – is the most egregious *Brady* violation imaginable.

28 U.S.C. §2244(b)(3)(C) provides that the court of appeals "may authorize the filing of a second . . . application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." Such a gate-keeping function by its very nature does not extend to a full-blown determination of the merits. *See*, *Felker v. Turpin*, 116 S. Ct. 2333, 2337 (1996); *Nevius v. Sumner*, 105 F. 3d 453, 462 (9th Cir. 1996); *Hatch v. Oklahoma*, 92 F. 3d 1012, 1016 (10th Cir. 1996).

Petitioners have shown that it took almost a solid year's work by a private investigator to uncover evidence previously denied to Petitioners' counsel, to a small army of civil litigants, and to the sheriff of Iberia Parish in his attempt to reinvestigate this case. If those concerted efforts on Petitioners' behalf did not amount to due diligence, it is difficult to imagine what the Act requires. Likewise, Petitioners' 400-page brief, supported by four volumes of exhibits, demonstrated that the State suppressed a staggering array of exculpatory evidence and manufactured much of its evidence against Petitioners. Without comment, the Fifth Circuit dismissed Petitioners' showing as inadequate.

In *Miller-el v. Cockrell*, 123 S. Ct. 1029 (2003), this Court, considering the analogous issuance of a certificate of appealability, cautioned against over-tightening the hinges on the gate. The proper question, the Court said, is not whether an appeal will succeed, but whether an overview of the claims suggests that resolution is "debatable among jurists of reason." *Id.* at 1039. By the same token, the issue here is not whether Petitioners must prevail on the merits

but whether they made a prima facie showing of meeting the statutory requirements. If these Petitioners cannot pass through the §2244(b)(3) portal, the gate must be locked.

CONCLUSION

The state district court, quoting from the State's brief, declared: "to exhume all of these long-dead issues, and to attempt to paint them in living, misleading colors, is a perversion of the legal system, and flouts Louisiana's legislative and judicial intent that criminal convictions must, at some time, become final." (App. p. 187).

With all due respect, justice must trump finality. In accusing Petitioners of "perverting the legal system" the state court turned justice on its ear. It remains for this Court to say that perjured testimony, falsified evidence, and suppression of the exculpatory truth are more offensive to our legal system than the prayers of two innocent men to be heard. Petitioners pray for a reversal of their convictions, or alternatively, for a transfer of their application to the district court for hearing and determination in accordance with 28 U.S.C. §2241(b).

Respectfully submitted,

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PRIOR OPINIONS

Decision of the Louisiana Supreme Court, affirming Petitioners' convictions, *State v. Alexander*, No. 59585, 351 So. 2d 505 (La. 1977) ..... App. 1

Decision of the 16th Judicial District Court for the State of Louisiana, denying Petitioners' Motion for New Trial, 10/26/83 ..... App. 21

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351 So.2d 505

STATE of Louisiana

v.

David Lynn ALEXANDER and Harry Junius Granger.

No. 59585.

Supreme Court of Louisiana.

Oct. 20, 1977.

Rehearing Denied Nov. 11, 1977.

Gerald Theriot, New Iberia, J. Michael Small, Gravel, Roy & Burnes, Alexandria, for defendants-appellants.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Knowles M. Tucker, Dist. Atty., Dracos D. Burke, Asst. Dist. Atty., for plaintiff-appellee.

SANDERS, Chief Justice.

The State indicted the defendants, David Lynn Alexander and Harry Junius Granger, with the armed robbery of Louis Gladu, a violation of LSA-R.S. 14:64[1] A jury found both guilty as charged. The court sentenced each to ninety-nine years at hard labor without benefit of probation, parole, or suspension of sentence.

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[1] The indictment also charged John Nelson Collins, Sr., Ronald Earl Miller, Herbert John Derouen, and Rene Jackson. Thereafter, the State granted Derouen immunity and dismissed the charge against Jackson. Both Miller and Collins pled guilty to accessory after the fact. See LSA-R.S. 14:25 and 64.

The defendants appeal. They rely on eighteen assignments of error for reversal of their convictions and sentences. Alexander specifically abandons Assignment of Error No. 3 in brief. Granger failed to brief or argue his Assignments of Error Nos. 1, 2, and 3.[2] Therefore, we consider them abandoned. *State v. Phillips*, La., 337 So.2d 1157 (1976); *State v. Blanton*, La., 325 So.2d 586 (1976); *State v. Carlisle*, La., 315 So.2d 675 (1975).

We adduce the following context facts:

Following a pre-arranged plan, the defendants and four accomplices drove in separate cars to the Hasty Mart, a convenience store, for the purpose of robbery. All six entered but separated in the store. The owner, Louis Gladu, came from behind the counter and spoke with Alexander. Alexander pulled a gun from his waistband and shot Mr. Gladu. As he fell, Alexander shot him again. Before leaving the store, they rifled the cash register.

ASSIGNMENT OF ERROR NO. 1 (ALEXANDER)

The defendant complains of the court's refusal to require the State to provide him with the substance of any oral inculpatory statement, as requested in his Bill of Particulars. He concedes that the law prohibits the defense from discovering oral confessions or inculpatory statements. However, he argues that the same factors

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[2] Throughout we refer to his formal assignments of error numbers filed in the trial court, rather than his argument numbers in his brief.

requiring disclosure of written inculpatory statements should compel discovery of oral ones.

In *State v. Watson*, La., 301 So.2d 653 (1974), we rejected a similar contention. Therein we stated:

> "Defendant argues, however, that the rule which allows the defendant to discover written confessions should be extended to include oral confessions. This court has consistently refused to extend this rule which was first announced in *State v. Dorsey*, 207 La. 928, 22 So.2d 273 (1945). Discovery by defendant in criminal cases is greatly restricted. In *State v. Dorsey*, supra, the court realized that it was in effect creating an exception to the rule that the defendant is not allowed to discover the evidence on which the prosecution bases its case. The court specifically limited the holding to a written confession by the accused.
>
> " * * *
>
> "Pretrial inspection of evidence, even of confessions, is not a question of constitutional proportions. There is no statute requiring the production of 'oral confessions.' Probably for the reason that the management of a scheme requiring such production would be difficult and complicated, Louisiana courts have consistently refused to extend the rule for production to oral statements of the accused." [Citations deleted.]

We conclude that the trial judge properly refused the defendant pre-trial discovery of any oral inculpatory statements.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2
(ALEXANDER)

The defendant alleges that the trial court erroneously denied him pre-trial inspection or copies of confessions made by others implicated in the offense. He admits that Louisiana law precludes a defendant from discovering such statements. However, he urges us to adopt an exception to this rule when the State grants immunity to those who confessed or were implicated in the crime. Here, the State granted immunity to Herbert John Derouen, a co-indictee, and Mary Arceneaux, one implicated.

That the State granted a person charged with or implicated in the crime immunity is inconsequential to the pre-trial discovery rights of the defense. When that person testifies at trial (as they did here), they become witnesses, and under our jurisprudence, a defendant is also denied discovery or pre-trial inspection of a *witness's* statement. *State v. Ball*, La., 328 So.2d 81 (1976); *State v. Rose*, La., 271 So.2d 863 (1973); *State v. Gray*, La., 286 So.2d 644 (1973). See LSA-R.S. 44:3.

Thus, we conclude that the trial court's ruling which denied the defendant pre-trial access to confessions of others implicated in or charged with the offense was proper.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 4 (ALEXANDER)

ASSIGNMENT OF ERROR NO. 4 (GRANGER)

In the presence of the petit jury venire, but prior to any voir dire questioning, the following exchange occurred:

> "BY THE COURT: Are you ready to proceed?
>
> "BY [ASSISTANT DISTRICT ATTORNEY]: Yes, your Honor. The State is ready to proceed in case Number 26375, State of Louisiana versus David Lynn Alexander and Harry Junius Granger. There are other defendants, however, at this time the State elects to proceed against those two named defendants only, and we elect to proceed with the trial of the armed robbery Indictment, under the authority of Article 61 and 704 of the Code of Criminal Procedure. And at this time we ask that the remaining defendants, and *remaining charges* be refixed for November the 8th, 1976, at ten o'clock." [Emphasis supplied.] [R. p. 542.]

By this remark, the assistant district attorney announced the defendants and charges to be tried that day, and those to be severed and tried at a later date. This information was essential to the court's understanding of the proceedings, since the indictment charged six men with the offense to be tried, armed robbery.

The defendants contend that the assistant district attorney's statement of "remaining charges" is an impermissible reference to another crime under Louisiana Code of Criminal Procedure Article 770.

That article sets forth the requisites for a mandatory mistrial. It provides in pertinent part:

> "Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, *during the trial or in argument*, refers directly or indirectly to:
>
> "(2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;" [Emphasis supplied.]

Louisiana Code of Criminal Procedure Article 774 confines the scope of argument "to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." The State's remarks lie outside the ambit of Article 774. In our opinion, this comment was not argument: it was preliminary explanation, essential to orderly trial procedure. Neither do we find that the remark occurred during trial, since the State had not yet called the first prospective juror for examination. LSA-C.Cr.P. Art. 761. Thus, we hold that the very terms of Article 770, our mandatory mistrial provision, render it inapplicable to the instant case.

However, a mistrial may be ordered when prejudicial conduct in the courtroom makes a fair trial impossible. LSA-C.Cr.P. Art. 775. The court should declare a mistrial only when unnecessary prejudice results to the accused, since mistrial is a drastic remedy. *State v. Governor*, La., 331 So.2d 443 (1976), and the cases cited therein. This determination lies within the sound discretion of the trial judge and will not be disturbed absent an abuse of that discretion. *State v. Haynes*, La., 339 So.2d 328 (1976).

The defendants' allegation that the comment indicated that they were charged with other crimes is a strained interpretation of the comment. We believe that the phrase "and remaining charges" refers to the preceding phrase "the remaining defendants." Based on this interpretation, we conclude that the State did not comment upon the defendants' other crimes.

Moreover, assuming that it was a reference to other crimes, we do not believe any prejudice resulted. Throughout the trial, the State introduced evidence of the murder of Mr. Gladu during the armed robbery. As this murder and the armed robbery formed "one continuous transaction," evidence of the murder was admissible as res gestae. LSA-R.S. 15:448.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 5 (ALEXANDER)

ASSIGNMENT OF ERROR NO. 5 (GRANGER)

The defendants aver that the trial judge unduly restricted the voir dire examination of Mrs. Suire, a prospective juror.[3]

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[3] In brief, the defendant Alexander urges an additional ground concerning the propriety of the trial court's denial of his challenge for cause of Mrs. Suire. However, this alleged error is improperly presented because counsel failed to voice a contemporaneous objection to the court's ruling. LSA-C.Cr.P. Art. 841.

During the State's questioning, Mrs. Suire stated that she could decide the case based solely on the evidence, that she would apply the law to the evidence as instructed, and that she could be a fair and honest juror. However, in responding to the defense's questions, she took a contrary position and stated that she could not be totally fair. Because of this discrepancy, the court questioned her. After some explanation by the judge, she answered that she could set aside all prior impressions, and could render an impartial verdict according to the law and evidence. When the judge denied the challenge for cause and tendered her to defense counsel, the following occurred:

> "BY [DEFENSE COUNSEL]: Mrs. Suire, when the Court asked you questions, you are of course obligated to answer honestly. On the other hand, you don't have to answer because you think the Judge might want a particular answer, and if because of any fact you feel that your judgment would be affected by something's that's happened in the past, you can admit it without getting in any trouble.
>
> "BY THE COURT: [Defense counsel], are you again going into the same things we have covered in the questions the Court has asked of this prospective juror?
>
> "BY [DEFENSE COUNSEL]: I intended to, yes, sir.
>
> "BY THE COURT: No. Well, that's not permissible. I have questioned the witness at length about this matter. I have determined from her answers that she's willing to be an impartial juror in this case. I'm not going to permit you to go back into that." [R. p. 975.]

When he continued his examination of Mrs. Suire, defense counsel immediately posed the following question to her:

> "Mrs. Suire, whether we touched on it, or whether we haven't, is there any reason which would prevent your being totally fair and totally impartial to both sides in this case? Whether we've mentioned it or not? Is there anything that would prevent that?" [R. p. 984.]

Mrs. Suire answered negatively.

The scope of voir dire examination lies within the sound discretion of the trial court. LSA-C.Cr.P. Art. 786. In *State v. Scott*, La., 307 So.2d 291 (1975), we stated:

> "A ruling by the trial court in connection with counsel's conduct of voir dire examination should not be disturbed by a reviewing court as long as the trial court has allowed counsel a wide latitude in examining jurors and has exercised a liberal discretion in delimiting the scope of the inquiry. See *State v. Jones*, 282 So.2d 422 (La.1973)."

In reviewing the scope of voir dire, this Court must consider the examination as a whole, or at least the entire record of examination of the prospective jurors during which defense contends such prejudicial curtailment occurred. *State v. Roach*, La., 338 So.2d 621 (1976).

The voir dire examination in the present case comprises nearly 750 pages and spans approximately 31/2 volumes of testimony. The court, assistant district attorney, and defense counsel questioned Mrs. Suire as to her fairness as a juror. As the voluminous record indicates, the trial judge afforded defense wide latitude in his voir dire. The ruling complained of merely prohibited repetitious

questions by defense counsel on the subject of a challenge which had previously been denied. We hold that the court's ruling was a reasonable limitation upon counsel's examination, and a permissible exercise of the court's discretion. See *State v. Landry*, La., 316 So.2d 738 (1975); *State v. Square*, 257 La. 743, 244 So.2d 200 (1971), vacated as to death sentence only, 408 U.S. 938, 92 S.Ct. 2871, 33 L.Ed.2d 760 (1972), compliance with the mandate, 263 La. 291, 268 So.2d 229 (1972).

In any event, despite the trial judge's ruling, counsel again asked Mrs. Suire about her fairness as a juror and received an answer indicating her impartiality. Under these circumstances, we find no prejudice. See *State v. May*, La., 339 So.2d 764 (1976).

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 6 (ALEXANDER)

ASSIGNMENT OF ERROR NO. 6 (GRANGER)

The defendants challenge the trial court's ruling which sustained a State objection that Captain Horace Comeaux's testimony was inadmissible as opinion evidence.

The factual basis of Comeaux's testimony is as follows: Jerry Paul Francis told him that he perpetrated the armed robbery. However, Francis later recanted that confession. He explained that one of the defendant's family bribed him to admit to the crime.

The objection arose as follows:

"BY [DEFENSE COUNSEL]:

Q. Right. And even though he was confessing to something that could get him ninety-nine years he was going to do it for money. At least that's what he said [when] he withdrew the confession. Is that correct?

"A. Yes, sir.

"Q. Did you ask him where he was going to spend that money?

"A. No, sir, I didn't. I didn't ask.

"Q. Well, he was charged with other bank robberies; he was admitting to a robbery; *does it seem peculiar to you that somebody would admit to a ninety-nine year offense* – " [Emphasis supplied.] [R. p. 1374.]

A witness may not testify "as to any impression or opinion that he may have." LSA-R.S. 15:463.

The question posed solicited Comeaux's ideas on Francis' motive in confessing. Clearly, this is inadmissible as opinion testimony. *State v. White*, 178 La. 98, 150 So. 843 (1933); *State v. Metoyer*, 162 La. 287, 110 So. 424 (1926).

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 7
(ALEXANDER)

ASSIGNMENT OF ERROR NO. 7
(GRANGER)

The defendants allege that the State's notice of its intention to use incriminating statements is deficient, pointing to the lack of details or a description of the statement.

The State described the statement as follows:

> "By the defendant, David Lynn Alexander, to one Andrus Wilson, on April 10, 1976, while both parties were confined in the Acadia Parish Jail, Crowley, Louisiana."

The State must advise the defendant of its intent to use a confession or inculpatory statement at trial. This notice must be in writing and tendered prior to the State's opening statement. LSA-C.Cr.P. Art. 768. In *State v. Sneed*, La., 316 So.2d 372 (1975), we interpreted the intent of Article 768 as follows:

> " . . . that the state must give sufficient notice of *each* confession or inculpatory statement it intends to use, with sufficient specificity as to date or occasion and as to persons to whom given as to afford adequate notice sufficient to permit the defendant a fair opportunity to meet the issue."

The notice need not include the details, description, or content of the statement. *State v. Sneed*, supra.

The notice given in the instant case is legally sufficient. It identified the person to whom Alexander made the statement, and the relevant date and location of the statement. Such information apprised him of the nature of

the statement to enable him to establish a defense as to that issue.

Assuming arguendo, that the notice was unsatisfactory, we find that its inadequacies created no prejudice, for the inculpatory statement which was the subject of the notice was never admitted into evidence. See LSA-C.Cr.P. Art. 921.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 8 (ALEXANDER)

ASSIGNMENT OF ERROR NO. 8 (GRANGER)

The defendants contend that the State improperly introduced evidence of an inculpatory statement Alexander made to Andrus Wilson during its rebuttal. They allege that *State v. Turner*, La., 337 So.2d 455 (1976), requires the State to offer this evidence during its case-in-chief.[4]

The State did not introduce Alexander's inculpatory statement during its case-in-chief. In presenting its case, the defendant Alexander testified that he did not rob the Hasty Mart or shoot Mr. Gladu. He also denied telling Wilson that he robbed and killed Mr. Gladu. However, he

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[4] The record does not indicate the full content of this statement. For purposes of discussion, we will assume that the statement also implicated Granger, thereby giving him standing to contest the statement's admissibility in rebuttal.

admitted that any conversations he had with Wilson were "free and voluntary."

In rebuttal, the State called Wilson. He testified as follows:

"BY [ASSISTANT DISTRICT ATTORNEY]:

"Q. What did he tell you about [the crime]?

"A. About it? Well, he just told me, you know, that – so they charged him with it.

"Q. Did he tell you that he had done it?

"A. Sir?

"Q. Did he tell you about how he did it?

"A. How he did it?

"Q. Yes.

"A. (Witness shakes head negatively)

"Q. Are you going to answer the question?

"A. Well-well, no, man. I – really – I not testify on nobody. So I not – I not going to tell you about it." [R. p. 1685.]

Noting that Wilson had a "change of heart after coming into the courtroom," the State excused him.

The defendants' allegation that the State improperly introduced Alexander's inculpatory statement has no factual basis. As shown by Wilson's testimony above, the statement was never introduced into evidence. Thus, the argument lacks merit.

Assuming that Wilson testified as to the contents of the statement, we hold that the trial court properly admitted it. In *State v. Turner*, supra, we explained the relevant rules on the introduction of evidence in the State's rebuttal as follows:

> "The state may not reserve part of its case-in-chief for rebuttal testimony, after the defense has put on its case and when it can no longer present evidence to rebut the state's case. This is contrary to statute, to ancient jurisprudence, and to rules of fair play.
>
> "In *State v. Monroe*, 205 La. 285, 17 So.2d 331, 332 (1944), we noted: 'Rebutting evidence is that which is offered to explain, repel, counteract, or disprove *facts* given in evidence by the adverse party.' (Italics [theirs].) Again, in *State v. Smith*, 120 La. 530, 532, 45 So. 415 (1908), we noted that rebuttal evidence is 'evidence which has become relevant or important only as an effect of some evidence introduced by the other side.'" [Citations omitted.]

Further, we recognized the following situation in our second footnote:

> "Of course, a confession or an inculpatory statement may be independently admissible in rebuttal, such as being proof of a prior contradictory statement if the accused takes the stand in his defense and denies having made it. *State v. Scott*, 320 So.2d 538 (La.1975)."

This Court concludes that this latter rule governs the admissibility of the inculpatory statement in this case. The defendant Alexander's denial of making the inculpatory statement and denial of any implication in the crime are

facts which the State may rebut. *State v. Brooks*, La., 294 So.2d 503 (1974), and the cases cited therein. See *State v. Watkins*, La., 340 So.2d 235 (1976). At trial, the State offered and the court accepted Wilson's testimony for impeachment purposes only. The State introduced sufficient evidence during its case-in-chief to carry its burden of proof; it did not use this statement to prove its case. See *State v. Hatter*, La., 338 So.2d 100 (1976).

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 9
(ALEXANDER)

ASSIGNMENT OF ERROR NO. 9
(GRANGER)

The defendants assert that the court erroneously sustained the State's objection to the introduction of 215 8" X 10" bank camera photographs as being irrelevant. These photographs depict Jerry Paul Francis and Preston Demouchet committing a bank robbery in Parks, Louisiana, two months after the instant robbery occurred. They argue that the photographs support their theory that Demouchet, Roy, and Francis actually perpetrated this armed robbery.

We pretermit a conclusion as to the relevancy and the admissibility of these photographs. The record indicates that Captain Comeaux described the evidence reflected in the photographs to the jury: that Demouchet and Francis robbed a Parks bank. Hence, we hold that the testimony describing the facts depicted in the photographs cured any error, if any, in the court's exclusion of the photographs. LSA-C.Cr.P. Art. 921; *State v. Cox*, 218 La. 277, 49 So.2d

12 (1950); *State v. Poe*, 214 La. 606, 38 So.2d 359 (1948). See also *State v. McGuffey*, La., 301 So.2d 582 (1974).

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 10
(ALEXANDER)

ASSIGNMENT OF ERROR NO. 10
(GRANGER)

The defendants complain of the court's ruling which sustained the State's objection to their offering a document styled "Disclosure by State." Prior to trial, the State apprised the defense of the history of the gun used in the armed robbery in this document.

When the judge sustained the State's objection, defense counsel stated "Yes, your Honor." [R. p. 1680.] Immediately thereafter, he offered another item into evidence.

We conclude that the defense has improperly presented these arguments and alleged error for our review. LSA-C.Cr.P. Art. 841; *State v. Charles*, La., 326 So.2d 335 (1976). In *Charles*, supra, we explained:

> "In these assignments defendant contends the trial court erroneously sustained the state's objections to cross-examination questions asked by defendant's counsel. On these occasions, although defendant did not expressly object, the court was necessarily aware of the action which defendant desired the court to take, viz., to overrule the state's objection and allow him to put the questions to the state's witness. However, defendant's counsel neither complained of the court's ruling nor apprised the court of the grounds upon

which he was entitled to ask the questions. Instead, he apparently acquiesced in the court's ruling by proceeding with his cross-examination along a different line of questioning.

"Essentially, Article 841 requires a party to apprise the court of an occurrence that the party contends is an irregularity or error as well as the basis for his contention. Since defendant did not comply with the statute he may not complain after verdict of the occurrences alluded to in these assignments of error. This rule is necessary to promote judicial efficiency by providing an adequate opportunity for the recognition and correction of errors during trial. *State v. Marcell*, *supra* [320 So.2d 195 (La.)]."

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 11
(ALEXANDER)

ASSIGNMENT OF ERROR NO. 11
(GRANGER)

Both defendants filed motions for a new trial which the trial court overruled. They now challenge the denials.

Alexander's motion urges that the trial court's ruling on his objections prejudiced him, and alternatively, that the ends of justice demand a new trial. Since we have heretofore determined that his objections have no substance, we conclude that his motion based on these objections is without merit. In addition, we dismiss his alternative ground because the contention that the ends of justice require the granting of a new trial presents nothing for our review. *State v. Clark*, La., 325 So.2d 802 (1976).

Thus, we hold that the trial judge properly denied his motion for a new trial.

In treating Granger's motion, we similarly find that the court correctly denied it. He alleges that the verdict is contrary to the law and evidence since no one positively identified him as a participant in the armed robbery, and that the State failed to prove that Granger or his accomplices stole anything of value. Further, he avers that the objections made at trial show prejudicial error.

As we have previously decided that defense's objections are without merit, this ground in his motion is also without merit. His remaining allegations raise an evidentiary issue, that is, if the evidence supports the conviction. Such a contention does not raise a reviewable question of law on appeal unless there is a total lack of evidence to prove the crime or an essential element thereof. *State v. Perkins*, La., 337 So.2d 1145 (1976); *State v. Williams*, La., 310 So.2d 513 (1975). A review of the record convinces us that there is some evidence of the crime and its essential elements. Witnesses testified that the defendants planned the robbery of a store; that a customer paid cash for purchases shortly before the defendants entered; that the defendants entered the store and exited, running; that minutes after they fled, another customer discovered the cash register open containing only a few nickles and pennies, with the spring clips in the upright position.

These assignments of error are without merit.

For the reasons assigned, the convictions and sentences are affirmed.

DIXON, J., concurs.

STATE OF LOUISIANA
VERSUS NO. 26375
DAVID ALEXANDER

16TH JUDICIAL DISTRICT COURT
PARISH OF IBERIA
STATE OF LOUISIANA

JUDGMENT

(Filed Oct. 31, 1983)

This matter comes before the Court on the motion of defendant, David Alexander, for a new trial. The Court denies the application for a new trial for the written reasons this day assigned.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the foregoing motion for a new trial by the defendant, David Alexander, be and the same is hereby denied.

Judgment read, rendered and signed in New Iberia, Iberia Parish, this 26th day of October, 1983.

/s/ Robert E. Johnson
JUDGE

/s/ Brenda D. Moore
DEPUTY CLERK OF COURT
IBERIA PARISH, LA.

STATE OF LOUISIANA	:	16TH JUDICIAL
ex rel	:	DISTRICT COURT
DAVID ALEXANDER	:	
HARRY GRANGER	:	
VS. NO. 86-60190	:	PARISH OF IBERIA
FRANK BLACKBURN, WARDEN	:	
Louisiana State Penitentiary	:	STATE OF LOUISIANA

REASONS FOR JUDGMENT

(Filed Apr. 23, 1986)

This case comes before the Court under the provisions of our code of Criminal Procedure entitled "Post-Conviction Relief", Articles 924-930.7. In addition to the application for post-conviction relief, petitioners herein have moved the Court to recuse the district attorney of the Sixteenth Judicial District claiming that the district attorney, Bernard E. Boudreaux, Jr., has a personal interest in the outcome of this cause which personal interest would influence him in the performance of the duties of his office, and conflict with the interests of justice, criminal procedure and the constitutional rights of the petitioners David Alexander and Harry Granger.

The grounds of recusation for the district attorney are set forth in Art. 680, C.Cr.P. It is clear from a reading of the Article and jurisprudence that the grounds for recusation contemplate recusation of the district attorney *prior to the prosecution of a case*. They have no bearing, in the opinion of the Court, on post-conviction proceedings. Art.

927 (A) C.Cr.P. (dealing with post-conviction relief) reads as follows:

> "If an application alleges a claim which, if established, would entitle the petitioner to relief, the court shall order the custodian, through the district attorney in the parish in which the defendant was convicted, to file an answer within a specified period not in excess of thirty days."

This codal article clearly contemplates that the district attorney is the proper person against whom post-conviction relief proceedings are to be conducted. Numerous cases, both federal and state hold that the district attorney is the proper person to represent the respondent in post-conviction proceedings.

Considering petitioner's Motion to Recuse the District Attorney as counsel for the respondent in this post-conviction proceeding, and further considering respondent's Answer, in particular the reference to C.Cr.P., Articles 680 (1), 681, 521, and 927 (A), this Court finds that petitioner has failed to allege any valid basis for recusing the district attorney in this post-conviction proceeding.

The application for post-conviction relief is something that is frequently presented to our criminal courts today. In a great majority of these cases the applications are pro se. Apparently the applicants obtain help from other prisoners who are knowledgeable in these matters, and these applications are being received by the judges in the State of Louisiana in increasing numbers. Petitioners, on these applications, should use the uniform applications for post-conviction relief approved by the Supreme Court of Louisiana. In this case, since the petition has been prepared

by legal counsel, it is unnecessary to insist upon use of the prescribed uniform application.

This Court is required to give written reasons for its judgment granting or denying relief. The Court may make summary disposition of the application or the Court can order evidentiary hearings. Art. 929 C.Cr.P. reads as follows:

> "A. If the Court determines that the factual and legal issues can be resolved based upon the application and answer, and supporting documents, including relevant transcripts, depositions, and other reliable documents, submitted by either party or available to the court, the court may grant or deny relief without further proceedings."
>
> B. For good cause, oral depositions of the petitioner and witnesses may be taken under conditions specified by the court. The Court may authorize requests for admissions of fact and of genuineness of documents. In such matters, the court shall be guided by the Code of Civil Procedure."

It can readily be seen that if post-conviction relief is available to those who have been convicted of violations of our criminal statutes on any of the technical grounds previously available at trial, our courts would become bogged in a never ending litigation process. Post-conviction relief proceedings are not designed for the retrial of defendants already convicted in criminal proceedings. Various remedies are available to criminal defendants immediately after trial, such as applications for new trial, and review by the appellate courts for possible errors committed during the trial itself. Once appellate review is completed, however, there are certain

restrictions upon the avenues down which the convicted person may seek relief.

The legislature has carefully spelled this out in C.Cr.P. Article 930.3 which reads as follows:

> "If the petitioner is in custody after sentence for conviction for an offense, relief shall be granted only on the following grounds:
>
> (1) The conviction was obtained in violation of the constitution of the United States or the State of Louisiana;
>
> (2) The Court exceeded its jurisdiction;
>
> (3) The conviction or sentence subjected him to double jeopardy;
>
> (4) The limitations on the institution of prosecution has expired;
>
> (5) The statute creating the offense for which he was convicted and sentenced is unconstitutional; or
>
> (6) The conviction or sentence constitute the ex post facto application of law in violation of the constitution of the United States or the state of Louisiana."

Claims for post-conviction relief based upon the grounds listed in subparagraphs 2-6 of the above article are extremely rare. This Court in its experience with criminal trials over a period of 13-1/2 years does not recall ever having a single instance of petitioners applying under any of those subparagraphs. All of the applications for post-conviction relief which the court has encountered over this period of time have alleged or attempted to allege, under Paragraph (1), that the conviction was obtained in

violation of the Constitution of the United States or of the State of Louisiana.

There is a minor additional factor in the instant case which should be mentioned. There has been considerable media coverage of the instant application for relief by petitioners, both on television and in the local press and radio. According to press reports, the current sheriff of Iberia Parish and his chief deputy seem to have involved themselves in the case by reopening the investigation into a crime that occurred during a previous administration. As a consequence, civil litigation is currently pending between the former sheriff and the current sheriff and some of their deputies.

The Court would emphasize that the interest generated by the media, and the personalities involved in any of the civil and criminal aspects of the case, have nothing whatsoever to do with the merits of these present applications. The Court will consider this case just as it would any similar application that comes before it.

At the outset, the Court notes that there was great public interest at the time of the trial, which commenced on September 13, 1976 and concluded on the night of September 17, 1976. Attachment 1 of respondent's Answer adequately outlines the evidence that was produced at trial, so it will not be repeated here. Suffice it to say that two key prosecution witnesses – Mary Arceneaux and Herbert Derouen – were granted immunity in exchange for their trial testimony. One of the grounds upon which this petition for post-conviction relief is based is the allegation that the testimonies of Arceneaux and Derouen were false and known by the State to be false. In support of this allegation, petitioners have submitted affidavits by

Arceneaux and Derouen, recanting their trial testimonies and purporting to explain why they perjured themselves during the trial. The problems raised by these recantations will be discussed below.

I. THE ALLEGATIONS THAT THE STATE KNOWINGLY USED PERJURED TESTIMONY

Before turning to the specifics of this case, it would be well to review the state of the jurisprudence concerning recantation of trial testimony. Our appellate courts, both state and federal, have dealt at great length with analagous situations. They have established clearly the principles of law which are to govern the trial courts in matters of this nature. One of the leading cases is *United States v. Kearney*, 682 F.2d 214 (1982), decided by the United States Court of Appeal for the District of Columbia. This rather lengthy decision is concerned with a claim for relief under 28 USC 2255, but it is equally applicable in resolving the constitutional questions in a claim for post-conviction relief in state courts. On page 219 of that opinion we find the following:

> [3] Attempts are numerous by convicted defendants to overturn their criminal convictions by presenting affidavits of recanting witnesses in support of a section 2255 motion. As stated above, courts treat such requests as a motion for new trial. *Pelegrina v. United States, supra.* Recanting affidavits and witnesses are looked upon with "the utmost suspicion" by the courts. *United States v. Vincent*, 491 F.2d 1326, 1332 (2d Cir.), *cert. denied*, 419 U.S. 880, 95 S.Ct. 144, 42 L.Ed.2d 120 (1974); *United States v. Johnson*, 487 F.2d 1278 (4th Cir. 1973); *United States v. Lewis*, 338 F.2d 137 (6th Cir. 1964); *Newman v.*

United States, 238 F.2d 861, 862 n.4 (5th Cir. 1956); *United States v. Ahern*, 612 F.2d 507, 509 (10th Cir. 1980) ("downright suspicion"); *United States v. Ward*, 544 F.2d 975 (8th Cir. 1976); *United States v. Mackin*, 561 F.2d 958, 961 (D.C.Cir.1977) ("recantations by witnesses for the prosecution are viewed with suspicion . . . "); *Johnson v. United States*, 291 F.2d 150, 154 (8th Cir.), *cert. denied*, 368 U.S. 880, 82 S.Ct. 130, 7 L.Ed.2d 80 (1961) (courts look upon recantation with suspicion).

[4] A motion for new trial may be decided on the basis of affidavits without an evidentiary hearing. *Ewing v. United States*, 135 F.2d 633, 638 (D.C.Cir.1942) (Rutledge, J.); *Hillman v. United States*, 192 F. 264, 272 (9th Cir. 1911), *cert. denied*, 225 U.S. 699, 32 S.Ct. 834, 56 L.Ed. 1263 (1912); *Chetkovitch v. United States*, 53 F.2d 26 (9th Cir. 1931); *Gordon v. United States*, 178 F.2d 896 (6th Cir.), *cert. denied*, 339 U.S. 935, 70 S.Ct. 664, 94 L.Ed. 1353; *United States v. Johnson*, 327 U.S. 106, 112, 66 S.Ct. 464, 466, 90 L.Ed. 562 (1946). *United States v. Ward, supra*, in the 8th Circuit, is to the same effect. In affirming the denial, without a hearing, of a new trial based on a recanting affidavit of a witness its *per curiam* opinion states:

> Appellants contend that the trial court erred in denying their new trial motion without the benefit of a hearing to determine the validity of the alleged recanted testimony. A motion for new trial based on newly discovered evidence may be decided ordinarily upon affidavits without a hearing. [citations omitted]. . . . Moreover, *the necessity for a hearing is diminished in cases involving challenged testimony where the trial judge*

> *has had an opportunity to observe the demeanor and weigh the credibility of the witness at trial.* [citation omitted] . . . Furthermore, 'courts look upon recantation with suspicion. The trial court, which has had the witness before it, is in a much better position to determine where the truth lies than an appellate court.' [citation omitted]. On this record we are satisfied the court did not abuse its discretion in failing to hold a hearing." 544 F.2d at 976. (emphasis added).

On page 220 and 221 we find the following language:

> Third, the same judge who had tried the case, and observed Warren's demeanor and testimony on the stand at the criminal trial, also ruled on the 1973 motion. Fourth, Warren's affidavit is conclusory in form. It merely states generally that his statement to the police and his testimony at trial were "partially untrue" without offering any explanation as to how he had learned of all the intricate details surrounding the crime unless he had personally observed them as he testified at trial.
>
> As in *United States v. Mackin*, 561 F.2d at 963, it defies credence that Silvia in his dying declaration, and Warren in his statement to the police and subsequent testimony, contrived identical falsehoods concerning the minute details and precise circumstances of the crime, and of all the events leading up to it. The principal portion of Warren's statement to the police is set forth as an appendix hereto. It was marked for identification as Defendant's Exhibit No. 1, but was not introduced into evidence. However, it was read

from and referred to extensively in the cross-examination of Warren by defense counsel. It was also shown to him. (App. 83-124).

[7] In considering a motion for new trial based on the contention that an affidavit by a recanting witness constitutes newly discovered evidence the first test to be applied by the judge is whether the court is reasonably well satisfied that the prior testimony was false. *Gordon v. United States*, 178 F.2d 896, 900 (6th Cir. 1949). If that first and primary ground is not satisfied, the primary ground for granting the new trial is lacking. *Id.* The trial judge who denied the 1973 motion obviously determined that Warren's affidavit, recanting his testimony at trial, was false. In so ruling he was in the same position as the judge in *United States v. Johnson*, 327 U.S. at 113, 66 S.Ct. at 467, where the Supreme Court observed with respect to the trial judge:

> He had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day. Consequently the trial judge was exceptionally well qualified to pass on the affidavits.

[8] The decision here on the 1973 motion was made "upon consideration of the files and records of this case and the opinion of the . . . Court of Appeals . . . " The court ruled: "(2) That the claims of error *respecting manufactured testimony,* the prosecutor's knowing use of perjured testimony, and ineffective assistance of counsel taken in light of the pleadings and record are mere conclusions without supporting facts. (3) That the motions, pleadings, files and records *conclusively show* that petitioner is entitled to no relief . . . " A factual determination that the *files*

and record conclusively resolved the issue is an adjudication "on the merits" even though no evidentiary hearing was held. *Sanders v. United States*, 373 U.S. 1, 16, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963), *Mayes v. Pickett*, 537 F.2d 1080, 1083 (9th Cir. 1976); *Hallowell v. United States*, 197 F.2d 926, 927 (5th Cir. 1952). It was therefore proper for the judge here to rely upon the 1974 decision of the trial judge and deny this 1980 motion without a hearing.

On page 222 we find the following language:

> On appeal the testimony must be considered most strongly in support of the jury's verdict. *Koolish v. United States*, 340 F.2d 513, 519 (8th Cir.), *cert. denied*, 381 U.S. 951, 85 S.Ct. 1805, 14 L.Ed.2d 724 (1965). No different rule applies to a section 2255 proceeding. Here, the evidence overwhelmingly supports the jury finding that Kearney was guilty beyond a reasonable doubt of murdering Officer Silvia. Consequently, no miscarriage of justice appears and Kearney's conviction must stand. Any argument that the conviction should be reversed because *Warren's* testimony was not believable is clearly unpersuasive. (See part V *infra*). The independent *corroborative* evidence just reviewed is so detailed and compelling that it constitutes conclusive testimony of Kearney's guilt without Warren's testimony. Kearney's claim here to the contrary, then, was properly dismissed by the District Court on the basis of such conclusive testimony. In addition the testimonial corroboration of all the details in the trial record by Warren's trial testimony disproves Warren's completely generalized, conclusory and belated affidavit that his statement when he voluntarily went to the police,

and his testimony at trial were untrue.[1] See discussion, *infra*, at 222-224.

On page 224 we find the following language:

In *Laughlin v. United States*, 474 F.2d 444 (D.C.Cir.1972), *cert. denied*, 412 U.S. 941, 93 S.Ct. 2784, 37 L.Ed.2d 402 (1973), we held that for any ground of relief presented in a prior section 2255 proceeding that was determined on the merits thereof, redetermination of that ground was dependent upon the judge's exercise of his sound discretion to find that the ends of justice would be served thereby. Accordingly, a reversal of such decision on such grounds must rest only upon a finding of abuse of that discretion. With respect to requiring a hearing we stated: "[N]o hearing is required where the District Court finds that the files and records of the case conclusively determine the issues raised, or that the grounds for relief have been previously determined on the merits and the ends of justice do not require redetermination." 474 F.2d at 452.

[13] Finally, the record testimony of Warren, and Officer Silvia's dying declaration,[8] which were part of the testimony the trial judge ruled on in denying the first section 2255 motion, are *exactly* the same on so many intricate factual details of the offense and the surrounding circumstances, involving timing, movements, location, description of tangible objects, even subjective causation for acts by individuals and practically every material fact to which Warren testified, that the claim in Warren's affidavit that he was not present when the murder was committed and did not see Kearney shoot Silvia as he voluntarily told the police, gave them a signed statement

(Dft. Ex 1, Govt. Ex H) and testified in court, is completely destroyed.[9]

On page 226 we find the following language:

VII. CONCLUSION

This case personifies the great abuse of repetitive post conviction section 2255 proceedings that clog the courts and raise unjustified hopes in convicted criminals that a new trial years down the road from their conviction will leave the government with insufficient witnesses and evidence to again obtain a conviction for a most heinous offense. Not only was the filing in this case untimely, but because the evidence overwhelmingly supports conviction beyond a reasonable doubt, and because the section 2255 issue had already been decided adversely to Kearney on the merits, there was virtually no chance that the motion would be granted.

In a recent case in the United States Court of Appeals for the Fifth Circuit, *United States v. Fishel*, 747 F.2d 271 (1984), we find the following language on page 273:

II.

[1, 2] 28 U.S.C.A. § 2255 requires that the district court grant an evidentiary hearing on petitioner's claim "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." A hearing is not required on claims based on unsupported generalizations, *United States v. Guerra*, 588 F.2d 519, 521 (5th Cir.1979), cert. denied, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 363 (1981) or on claims that have been decided on direct appeal, *United States v. McCollom*, 664 F.2d 56, 59 (5th Cir.1981), cert. denied, 456 U.S. 934, 102

S.Ct. 1989, 72 L.Ed.2d 454 (1982). Allegations of perjured testimony must be supported by substantial factual assertions capable of resolution by an evidentiary hearing. See *United States v. Johnson*, 679 F.2d 54, 57-58 (5th Cir.1982).

[3] Fishel's claim of entrapment is precluded by our decision on direct appeal. We found Fishel's claim wanting even if Fishel's theory that Ludwig was actually a government operative were accepted.

[4] We now turn to Fishel's argument that he was entitled to a hearing on his allegations of prosecutorial misrepresentation and other misconduct. The core of this contention is that Ludwig was a government agent or informant, and DEA agent Braziel and the assistant United States attorney representing the government knew it.

The only specific facts Fishel alleges in support of the inference he would have a factfinder draw – that Ludwig was a government agent – are his allegations of insubstantial sentences or other lenient treatment Ludwig received for drug trafficking. The direct sworn testimony of agent Braziel and statements of the government directly refute and explain the inference Fishel would have the factfinder draw from this circumstantial evidence. Additionally, Fishel's charge that agent Braziel and the government lied is conclusory and speculative.

Where, as here, allegations contained in a habeas petition are either contradicted by the record or supported by conclusory factual assertions incapable of being tested in an evidentiary hearing, no hearing is required.

AFFIRMED.

In *Taylor v. Maggio*, 581 F.Supp. 359, a 1984 case in the Eastern District of Louisiana we find the following language on page 362:

> I. MANUFACTURED EVIDENCE
>
> The essence of Petitioner's first claim is apparently that the prints sent out to the FBI as described above were somehow manipulated to produce a match – that is, that the Petitioner's conviction and sentence was unconstitutionally obtained by "the State's use of forged, altered, and substituted fingerprints." (Petition at page "5c" of the attachment.)
>
> [1, 2] It should be stated at the outset that the Fourteenth Amendment due process clause prohibits deliberate use of perjured testimony or falsified evidence by the prosecution, and that police knowledge of perjured testimony or falsified information is imputed to the prosecution. *Rivera v. Martin*, 484 F.Supp. 162, 164 (W.D.Va.1980), and the case cited therein. However, mere conclusory allegations are not sufficient to make out a claim. Petitioner does not suggest just how the prints were altered or concocted to incriminate Taylor; he merely makes the naked charge of wrongdoing (although the State courts have specifically found he was unable to explain how he came into possession of the Buick which Mr. Vogler was going to show for sale).
>
> [3, 4] Before determining whether to order the State to answer the petition or to hold an evidentiary hearing the Court must examine the petition and all exhibits to determine whether

the petition plainly fails to state a claim for habeas relief, and should, therefore, be summarily dismissed. Federal Rule for Habeas Corpus Rule 4; *See also, Allen v. Perini*, 424 F.2d 134 (6th Cir.1970) *cert. den.* 400 U.S. 906, 91 S.Ct. 147, 27 L.Ed.2d 143. In order to avoid summary dismissal the petition must set out specific, substantive facts that enable the Court to determine that there is a real possibility that constitutional error has been committed. *Aubut v. State of Maine*, 431 F.2d 688 (1st Cir.1970). The Court must also examine the petition's factual allegations and determine whether the allegations are so "palpably incredible . . . so patently frivilous or false as to warrant summary dismissal", *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 1631, 52 L.Ed.2d 136 (1977). Although the showing a petitioner should make need only be a slight one to warrant a hearing, mere naked charges without some rational basis in supportive fact are not enough. Courts should not be intimidated into obstructing the finality of criminal justice by ordering habeas hearings based on mere conclusory or fanciful charges. Thus, if the petition is "patently frivolous" or "palpably incredible", it may be summarily dismissed.

[5] Petitioner cites *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) as authority for requiring this Court to order an evidentiary hearing. This Court does not read *Townsend* as instructing Federal Courts to grant evidentiary hearings in every instance in which a State court fails to do so. Petitioner must make some rational showing of entitlement. If a petitioner's allegations are "incredible" or "frivolous", a hearing is not mandated. 83 S.Ct. at 759.

In *Taylor v. Maggio*, 727 F.2d 341, (1984), on appeal to the Fifth Circuit, the Fifth Circuit Court of Appeal affirmed, dismissing the appeal.

The case of *State v. Prudholm*, 446 So.2d 729 (La. 1984) although dealing with an application for a new trial, expresses Louisiana's long-standing acceptance of the universal jurisprudential principle that recantation of trial testimony is to be viewed with the utmost skepticism.

In *Prudholm* at page 736 we find the following:

> [10, 11] Similarly, we find no error in the trial judge's refusal to order a new trial based on Reggie Hicks' recantation of his earlier testimony and statement at the motion for a new trial that Prudholm was not present at the rape scene and had not raped Mrs. Victim, but that another man, Kirk Johnson, had actually committed the crime. In considering Hicks' recantation, we adhere to our previous view that recantations are highly suspicious and, except in rare circumstances, a motion for new trial should not be granted on the basis of a recantation since that disclaimer is tantamount to admission of perjury so as to discredit the witness at a later trial. *State v. Clayton*, 427 So.2d 827 (La.1982). Since there are no special circumstances which would suggest that Hicks' latest testimony is truthful, the trial judge reasonably could have concluded that Hicks' recantation would not have created a reasonable doubt of guilt in the mind of any reasonable juror.

Relying upon these generally accepted legal principles, the Court now turns to the specific recantations presented by petitioners.

1. Mary Arceneaux's affidavit of recantation.

Arceneaux's affidavit of January 28, 1986 declares that her trial testimony in September, 1976 was false, that she was instructed by the sheriff's department as to what to say, and that she was provided "monetary assistance by the offices of the sheriff and the district attorney from the time of her initial statement until the outcome of the trial."

This Court must now determine whether Arceneaux's affidavit of recantation is worthy of any consideration at all in disposing of the petition for post-conviction relief. As mentioned above, post-trial recantations of trial testimony must be viewed with the utmost skepticism, so it is in that light that Mary Arceneaux's affidavit will be scrutinized.

a) In the first place, this Court well recalls that Mary Arceneaux testified under oath at petitioners' trial in September, 1976 and that she was subjected to thorough cross-examination by highly competent defense counsel. Her credibility as a witness for the state was a key issue in that trial, and this Court instructed the jury on the credibility of witnesses. Obviously, the jury believed Mary Arceneaux was testifying truthfully, since it returned verdicts of guilty as charged.

b) The trial testimony of Mary Arceneaux was corroborated not only by the trial testimony of Herbert Derouen, but by other evidence cannot be recanted. For example:

> (1) Arceneaux testified how the car occupied by Alexander, Granger, Collins and herself had driven a short distance down a gravel road before turning around at a barn near the Hasty Mart just before 3 P.M., March 30, 1976. At the

trial, a woman who lived only a few feet from that barn testified how she had observed just such a vehicle, occupied by four blacks, turn around at her barn at precisely that time (R. 1402-1405).

(2) Arceneaux testified at trial that in Alexander's haste to flee the scene of the crime, Collins had been left behind. This trial testimony was corroborated by the testimony of the customer who discovered Mr. Gladu's body in the store just after he had been shot. As she drove up to the Hasty Mart, at approximately 3 P.M., this lady noticed a strange man in the field immediately adjacent to the Hasty Mart (R. 1383-1384).

(3) That part of Arceneaux's trial testimony that described Alexander's automobile was corroborated by the appearance of the car itself. Especially important was Arceneaux's testimony of how Granger, at Alexander's direction, had secured a loose tailpipe on Alexander's direction, had secured a loose tailpipe on Alexander's car with a coathanger (R. 1434-1435). When Alexander's car was seized a week after the crime, the loose tailpipe was tied to the frame with a piece of wire (Trial Exhibit S-8).

(4) This Court cannot overlook the corroborative significance of the fact that John Nelson Collins and Ronald Miller – who were identified at petitioners' trial by both Arceneaux and Derouen as being present before, during, and after the actual crime – subsequently pleaded guilty in separate proceedings to being accessories after the fact to the Hasty Mart robbery. This Court takes judicial notice of those two pleas of guilty in Iberia cases No. 26712 (Miller) and 26718 (Collins).

c) It must not be forgotten that, despite Alexander's trial testimony to the contrary (which the jury did not believe), Mary Arceneaux testified that she was a close associate of his (Tr. 1413) – a factor which must always be considered in evaluating the credibility of post-trial recantation. *Thompson v. Garrison*, 516 F.2d 986 (4 Cir. 1975).

d) Arceneaux's present status as a prisoner in the state penitentiary could not help but create in her mind ideas of how she might best advance her own interests. Certainly a statement from one in Arceneaux's present circumstances cannot be accorded the same credibility as might be extended to a statement from a gainfully employed, free citizen. *United States v. Kearney*, 682 F.2d 214 (C.A.D.C. 1982).

e) Arceneaux's recantation more than nine years after her trial testimony is further minimized in credibility by the fact that it was obtained from her in prison by petitioners' representatives, as is evidenced by the signatures of petitioners' legal counsel on that affidavit.

f) This Court also takes judicial notice of the fact that at the time of her affidavit of January 28, 1986, Mary Arceneaux's criminal record reflected five felony convictions, covering three different parishes. The last four of these convictions occurred subsequent to her trial testimony. Her credibility at this point in her criminal career is worthless. La. R.S. 15:495.

g) That part of Arceneaux's 1986 affidavit that states that her trial testimony was furnished to her by members of the sheriff's department is directly contradictory to her sworn testimony at the 1976 trial. At the trial she testified that she was the first person to report the names of the

perpetrators to the authorities, and that she had done so of her own volition, primarily because the murder of Mr. Gladu was more than she had bargained for (R. 1438-1439). At the time of the trial, the undersigned, as trial judge, was in the best position of anyone in the courtroom to determine whether Mary Arceneaux was telling the truth about how and why she had reported the crime, and it is unnecessary to rely upon the affidavit of Mrs. Clothilde Antoine, who first advised Arceneaux to go to the sheriff with her information (Exhibit 6 of Respondent's Answer), for this Court to reject the 1986 recantation as false.

h) The circumstances of the Hasty Mart crime, involving, as it did, seven persons in two automobiles, are too bizarre to be false. Had a frame-up been planned, for whatever reason (and petitioners suggest none), surely the planner would have employed a much simpler scenario.

i) Finally, this Court presided over petitioners' trial in 1976, and heard and saw the testimony of Mary Arceneaux and the other witnesses. This Court observed the demeanor of the witnesses on direct and cross-examination, and was satisfied that Mary Arceneaux was testifying truthfully at trial. Her affidavit of recantation, made nine years after her trial testimony, and under the questionable circumstances outlined above, is unworthy of belief. *United States v. Adi*, 759 F.2d 404, 408 (5th Cir. 1985), *United States v. Kearney*, 682 F.2d 214 (C.A.D.C. 1982), *United States v. Johnson*, 327 U.S. 106, 112, 66 S.Ct. 464 (1946).

2. Herbert Derouen's affidavit of recantation.

Herbert Derouen's affidavit of January 29, 1986 declares that after his arrest in April 1976 he was beaten by the sheriff's deputies and instructed how to testify at the trial. As in the case of Mary Arceneaux's attempt to recant her trial testimony, Derouen's recantation must be carefully examined in order that its credibility be determined. Because it too is a recantation of sworn trial testimony, it must be viewed with the utmost skepticism. *State v. Prudholm*, supra.

a) Because of his prior association with Alexander and the fact that, until Derouen's grant of immunity, Derouen and Alexander were both co-defendants in the Hasty Mart crime, Derouen's change of heart in favor of his former accomplice is especially suspicious. Now that Derouen is no longer vulnerable to prosecution for the robbery, or for being an accessory thereto, it is not unnatural for him to want to help Alexander. *Thompson v. Garrison*, supra.

b) Derouen's present ulterior motive in claiming to have been beaten and coached after his arrest ten years ago is apparent from the fact that he and four other participants in the Hasty Mart crime, including petitioners, apparently have recently retained the same legal counsel in anticipation of damage suits against Iberia Parish authorities arising out of the 1976 investigation and arrests. The "utmost skepticism" with which any recantation must be viewed is multiplied many times over by this close and long-term relationship between petitioners and Herbert Derouen, and this obvious motivation to overturn the ten-year-old convictions.

c) There is nothing in the record to support Derouen's allegation of testifying at trial under duress. In fact, all the evidence is to the contrary. He was represented by legal counsel from the very outset, yet no complaint was ever made until Derouen was enlisted on petitioners' behalf in the present cause. The duress he complains of could hardly have persisted through both the grand jury proceedings and the trial itself many months after arrest.

d) As in the case of Mary Arceneaux, this Court had the opportunity to observe Derouen's demeanor on the witness stand at trial during both direct examination and some rather sharp cross-examination. He came across as being not very bright – in fact, incapable of being used to present fabricated testimony – but as an honest witness, testifying freely and voluntarily and to the best of his recollection. This Court is convinced that Derouen's trial testimony was truthful and free from duress of any kind. *United States v. Adi*, supra, *United States v. Kearney*, supra, *United States v. Johnson*, supra.

e) Again, as was true with Mary Arceneaux, Derouen's trial testimony was corroborated by other evidence at trial and otherwise of record. his trial testimony meshed with all important aspects of Mary Arceneaux's testimony, and was further corroborated by other evidence. His account of going out to the Hasty Mart on the night before the robbery, and of leaving hurriedly when the unexpected customer drove up (R. 1459-1461), was corroborated by the testimony of that customer (R. 1493-1498). His account of the presence of Ronald Miller and John Nelson Collins at the scene of the crime and later in St. Martinville is corroborated by court records reflecting that both Miller and Collins later pleaded guilty to being accessories after the fact to the Hasty Mart robbery.

e) The "utmost suspicion" that cloaks Derouen's recantation is heightened considerably by the fact that he did not complain to anyone about mistreatment nor come forward voluntarily to report what he now claims to be a miscarriage of justice. He remained silent until apparently solicited by Alexander's representatives to assist them in the present effort to obtain post-conviction relief. This is evidenced by the signatures on Derouen's affidavit of January 29, 1986 – Alexander's father, and the attorney who represents both Alexander and Derouen himself.

Finally, this Court must comment upon the unlikelihood that Herbert Derouen and Mary Arceneaux were testifying according to some prepared script, which – for undisclosed motives – sheriff's deputies had drawn up in order to charge the six original co-defendants with the Hasty Mart robbery and murder.

Herbert Derouen's borderline intelligence would immediately have disqualified him from being selected as a key witness in such a plot. From this Court's observation of his courtroom demeanor and testimony, this Court concludes that Derouen would be the last person in the world to entrust with the task of remembering the details of any complicated set of facts. Nevertheless, the court is satisfied that he was capable of testifying as to events in which he actually participated.

3. Affidavits of Sheriff Romero and Captain Davis

Petitioners have included affidavits by Sheriff Romero and his Chief of Detectives, Kerry Davis, relating their recollections of a conversation with Assistant District Attorney Dracos Burke. The two affidavits are to the effect that, "during the latter part of 1985" Mr. Burke stated

that, at some time prior to petitioners' trial in September 1976, he had seen District Attorney Knowles Tucker give Mary Arceneaux $320 to make restitution on some worthless checks prior to dismissing the worthless check charges.

Respondent's answer challenges the accuracy of Sheriff Romero's and Captain Davis' recollection of that conversation, and, in support of that challenge, includes a document from the district attorney's office records (Exhibit 2). That document is a memorandum, dated January 24, 1977 that reflects that the only payment made by the district attorney in this case occurred some four months after petitioners' trial. The memorandum also reflects that the payment was not to Mary Arceneaux, but to one of her victims in the total amount of $170. (Note: This Court takes judicial notice of its own action on March 21, 1977 in St. Martin case No. 36731, terminating Mary Arceneaux's probation, precisely as was recommended in the district attorney's memorandum of January 24, 1977, marked as Exhibit 2 of Respondent's Answer.)

Looking solely to the contents of the affidavits by Romero and Davis, and disregarding the fact that they are convincingly refuted by the January 24, 1977 memorandum from the district attorney's office, those affidavits do not raise any issue of bribery of a witness. Assuming that Mr. Tucker did make restitution for $320 worth of bad checks on Mary Arceneaux's behalf, and further assuming – contrary to the district attorney's records – that this took place prior to petitioners' trial, there is no valid suggestion that the state was thereby purchasing perjured testimony.

At the petitioners' trial, Mary Arceneaux testified that she had approached the authorities voluntarily with her

information concerning the crime, and that she had received no reward (Tr. 1438). On cross-examination, defense counsel brought out that she had been told that she would receive "help" on pending worthless check charges in St. Martinville (R. 1442). Defense counsel was already aware of that fact because the state had served defense counsel, a month prior to trial, with written notice of that promise to Arceneaux (R. 134). A copy of that written notice was included as an attachment to the present petition.

Defense counsel had full opportunity, on cross-examination, to explore whether the "help" promised by the state had extended to restitution to the victims. That he chose not to do so reflects good judgment on his part. Had Arceneaux responded, in the manner suggested by the Romero-Davis affidavits, that the district attorney's assistance had consisted solely of restitution to her victims, the jury might well have been favorably impressed by the state's concern for the victims of crime.

The cross-examiner at trial properly focused his inquiries upon the grant of immunity to Arceneaux and the dismissal of the worthless check charges. Whether restitution had been made to the victims in an unrelated worhtless check case could have been of no significance as a possible basis for impeaching Arceneaux's testimony in the armed robbery case.

So, assuming the Romero-Davis affidavits to be accurate (despite their conflict with the district attorney's records), they do not raise a credible allegation that the state knowingly used perjured testimony at trial. In fact, if this is what Mary Arceneaux meant by the "monetary

assistance" referred to in her affidavit, that part of her affidavit is rendered harmless.

4. Affidavit of Steve Woodring

Woodring's affidavit does nothing to support the allegation that petitioners were convicted in violation of their constitutional rights. His statement that he once saw Deputy Comeaux strike Herbert Derouen is vague and unsubstantiated. His statement that he had heard "various people" talking about Mary Arceneaux being paid by the sheriff and the district attorney is pure hearsay and entitled to no further consideration.

5. Affidavit of Edward Rubin

Mr. Rubin's affidavit simply authenticates the accompanying transcript of an interview with one Russell Daniels. In that interview, Daniels claimed that Mary Arceneaux had informed him that she had not been involved in the Hasty Mart crime, but was being paid $1500 in a lump sum, plus weekly payments of $200 for the next five years, in exchange for her trial testimony.

As pointed out in Respondent's Answer Daniels' story was known to defense counsel prior to trial. The record reflects that Russell Daniels had been subpoenaed as a defense witness although he was never called to testify, and Mary Arceneaux was cross-examined as to her relationship with Russell Daniels. Defense counsel chose not to press too hard on this line of inquiry for the obvious reason that it has no indicia of validity. Even Mr. Rubin, Miller's defense counsel, did not think enough of it to risk letting Miller go to trial rather then to plead guilty as he eventually did.

Petitioners, having chosen in September 1976 not to bring up Russell Daniel's incredible story, are not entitled to use it as a basis for post-conviction relief.

6. Conclusion as to allegations of perjury

The bare allegations contained in the affidavits of Herbert Derouen and Mary Arceneaux are unsupported by an indicia of reliability in the record. To the contrary, the record of trial and other matters of which this Court may take judicial notice make it obvious that the allegations are conclusory, without merit and deserving of no further consideration. *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983). Petitioners' trial in 1976 was fairly conducted and well-defended. They were properly convicted and their convictions and sentences were upheld by a unanimous Louisiana Supreme Court. 351 So.2d 505 (La. 1977). To reopen this case, ten years after the convictions, based upon these utterly worthless affidavits of Derouen and Arceneaux would be a travesty of justice. *United States v. Fishel*, supra; *United States v. Kearney*, supra.

II. AS TO ALLEGATIONS OF NEWLY-DISCOVERED EVIDENCE

Petitioners' claim of "newly-discovered evidence" may be peremptorily disposed of by noting that newly-discovered evidence is not among the statutory grounds for post-conviction relief. C.Cr.P. Art. 930.3 Even if it were, none of petitioners' three claims of newly-discovered evidence has merit, for reasons outlined in Respondent's Answer.

III. AS TO THE ALLEGED INEFFECTIVENESS OF COUNSEL

In a fairly recent case before the United States Supreme Court, *Strickland v. Washington*, 104 S.Ct. 2052 (1984) the Court attempted to resolve; once and for all, the ever-recurring claims of ineffectiveness of trial counsel.

III.

[5] A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

[6] As all the Federal Courts of appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See *Trapnell v. United States*, 725 F.2d at 151-152. The Court indirectly recognized as much when it stated in *McMann v. Richardson*, *supra*, [illegible] 1449, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent

attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also *Cuyler v. Sullivan*, *supra*, 446 U.S., at 344, 100 S.Ct. at 1716. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See *Michel v. New York*, 350 U.S. 91, 100-101, 76 S.Ct. 158, 163-164, 100 L.Ed. 83 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

[7-9] Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler v. Sullivan*, *supra*, 446 U.S. at 346, 90 S.Ct. at 1717. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell v. Alabama*, 287 U.S., at 68-69, 53 S.Ct., at 63-64.

[10] These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such [illegible] act and restrict the wide latitude counsel must have in making tactical decisions. See *United States v. Decosier*, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

[11] Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude, that a particular act or omission

of counsel was unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See *Michel v. New York*, *supra*, 350 U.S., at 101, 76 S.Ct. at 164. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

[Illegible] ineffectiveness claim must judge [illegible] reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or emissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

On page 2067 and 2068 we find the following:

[15] An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365, 101 S.Ct. 665, 667-668, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

[16] In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States v. Cronic*, ___ U.S., at ___-___, and n. 25, 104 S.Ct., at 2046-2047, and n. 25. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. *Id.* at ___, 104 S.Ct., at ___. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

[17] One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U.S., at 345-350, 90 S.Ct., at 1716-1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to [illegible] or representation corrupted by conflict of interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, *e.g.*, Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and "that an

actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, *supra*, 446 U.S., at 350, 348, 90 S.Ct., at 1719, 1718 (footnoted omitted).

[18] Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 866-867, 102 S.Ct. 3440, 3446-3447, 73 L.Ed.2d 1198 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief of Respondent 58. That

> standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.

Thus, under *Strickland v. Washington*, trial counsel is strongly presumed to have rendered adequate assistance. To obtain reversal of a criminal conviction, petitioners must show

> 1) that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment,
>
> 2) that counsel's errors were so serious as to deprive defendant of a fair trial – a trial whose result is reliable.

The allegation by petitioners that trial counsel failed to call alibi witnesses known to counsel fails to meet either of the *Strickland* criteria. The record reflects that Alexander's trial counsel tentatively attempted an alibi defense when he called Ms. Gail Guidry, as his first defense witness (R. 1538). After Ms. Guidry had been subjected to cross-examination, however, the validity of the alibi defense appeared significantly weakened (R. 1545-1557). Defense counsel immediately abandoned that strategy and, as alleged by the petitioners, called no more alibi witnesses. This change of strategy reflects a prompt and necessary adjustment to trial strategy, rather than ineffectiveness of counsel.

By alleging that the uncalled alibi witness were known to trial counsel, petitioners have conceded that trial

counsel had made sufficient investigation into the feasibility of an alibi defense to have considered that strategy. The adjustment in strategy after the first alibi witness had proved ineffective reflects good legal judgment – not ineffectiveness. As the Court said in *Strickland*: " . . . strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . "

The second allegations of ineffectiveness – that trial counsel was ineffective in failing to challenge venirman Alden Breaux for cause is totally without merit. The fact that Mr. Breaux had once been an honorary deputy sheriff, with no actual involvement in law enforcement, did not provide a valid legal basis for a challenge for cause. *State v. Ballard*, 337 So.2d 481 (La. 1976). The cases cited by petitioners are concerned with veniremen with actual participation in the law enforcement process, and do not control disposition of this issue.

An obviously invalid challenge for cause, after all peremptory challenges had been exhausted, would only have worsened the situation for petitioners. Actually, trial counsel displayed a high degree of professional skill in diplomatically attempting to persuade Mr. Breaux that Breaux himself should ask to be excused for medical reasons (R. 1262-1265). This attempt failed when Breaux satisfied the trial court, and counsel, that there was no reason, physical or otherwise, why he should not be seated as a juror (R. 1255-1271).

In the light of the *Strickland* criteria, this Court finds nothing in petitioners' allegations of ineffectiveness of trial counsel that warrants overturning their convictions.

As the trial judge that presided over petitioners' trial, this Court was much impressed with the professionalism and competence demonstrated by petitioners' trial team. Mr. J. Michael Small, then of the firm of Gravel, Burnes, and Roy, of Alexandria, Louisiana, acted as lead counsel, and he was ably complemented by Mr. Jerry Theirot of New Iberia. There was obviously a well-prepared defense by two professionals whose strategy, although planned in advance, was flexible enough to meet the changing developments of the trial. In thirteen and one-half years as a trial judge, this Court has not seen a more professionally or better prepared defense effort. There is absolutely no validity to these allegations of ineffectiveness of trial counsel.

IV. AS TO THE PSYCHOLOGICAL STRESS TESTS

The contents of paragraph V-D of the petition raise no specific ground upon which post-conviction relief might be based. It declares that certain witnesses were determined to have been truthful "when they indicated that petitioner David Alexander was not a participant of the robbery and murder of Louis Gladu." An accompanying affidavit by Ronald J. Lauland, elsewhere identified as petitioner's private investigator, contains his pronouncement that he had tested nine named individuals and concluded that they were telling the truth concerning Alexander's innocence. Of those nine persons, the record of trial reflects that five of them – Alexander, Arcenaux, Lee, Guidry, and Roy – testified at the trial. Harry Granger, who also passed Mr. Lauland's test, is one of the petitioners, but he chose not to testify in his own behalf at the trial. Theresa Collins, who passed the test, has not appeared before in the record of trial, so the significance of her veracity is

unclear. The remaining two persons who were tested – Ronald Miller and John Nelson Collins – were co-defendants of petitioners. They did not testify at petitioners' trial, but, as already mentioned, pleaded guilty at a later date to being accessories after the fact to the crime for which petitioners were convicted. The Court takes judicial notice of those two convictions.

According to the petition, the lie detection device used by Mr. Lauland was the psychological stress examination – which is a voice stress analysis device – not the well-known polygraph equipment. The jurisprudence of this state *permits* this Court, in post-trial proceedings, to consider the results of polygraph testing done under rigidly controlled procedures. *State v. Catanese*, 368 So.2d 975 (La. 1979). There is nothing in the jurisprudence, either federal or state, which grants the psychological stress evaluation tests any degree of credibility. In the light of the type of lie detection devise used, and the circumstances and timing of its use, this Court concludes that the results of Mr. Lauland's testing would be of no value in resolving the issues raised in the petition.

V. CONCLUSION

This Court finds that the petition for post-conviction relief is based upon mere conclusory or fanciful and unsupported allegations. *Taylor v. Maggio*, 581 F.Supp. 359 (E.D. La. 1984). As the trial judge who had the opportunity to observe the demeanor and weigh the credibility of the witnesses at trial, this Court has no hesitation in concluding that the affidavits of recantation are worthless. *United States v. Kearney*, supra at p. 219. Further, petitioners were aggressively and skillfully defended at trial, *Strickland v. Washington*, supra. There

Strickland v. Washington, supra. There is nothing in the petition that can overcome the evidence already a matter of record and of which this Court can take judicial notice. Accordingly, the petition is hereby denied. *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983), *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982), *Cunningham v. Estelle*, 536 F.2d 82 (5th Cir. 1976), *United States v. Curry*, 497 F.2d 99, 101 (5th Cir. 1974).

New Iberia, Louisiana this 23rd day of April 1986.

/s/ Robert E. Johnson
DISTRICT JUDGE

STATE OF LOUISIANA	:	16TH JUDICIAL
ex rel	:	DISTRICT COURT
DAVID ALEXANDER	:	
HARRY GRANGER	:	PARISH OF IBERIA
VS. NO. 86-60190	:	
FRANK BLACKBURN, WARDEN	:	
Louisiana State Penitentiary	:	STATE OF LOUISIANA

JUDGMENT

(Filed Apr. 23, 1986)

This matter comes before the Court on petitioners' application for Post-Conviction Relief, and on petitioners' motion to recuse the District Attorney of Iberia Parish; when, upon considering the law, the evidence, and the argument of counsel, the Court considering the same to be in favor of respondent, Frank Blackburn, Warden Louisiana State Penitentiary, and against the petitioners, David Alexander and Harry Granger, for written reasons this day assigned, therefore,

IT IS ORDERED, ADJUDGED AND DECREED, that there be Judgment denying the motion to recuse the District Attorney of Iberia Parish.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that petitioners' Application for Post-Conviction Relief be and the same is hereby denied and dismissed.

Costs are assessed against applicants.

JUDGMENT READ, RENDERED AND SIGNED IN CHAMBERS at New Iberia, Louisiana, this 23rd day of April, 1986.

/s/ Robert E. Johnson
DISTRICT JUDGE

STATE OF LOUISIANA	:	16TH JUDICIAL
ex rel	:	DISTRICT COURT
DAVID ALEXANDER	:	
HARRY GRANGER	:	PARISH OF IBERIA
VS. NO. 86-60190	:	
FRANK BLACKBURN, WARDEN	:	
Louisiana State Penitentiary	:	STATE OF LOUISIANA

SUPPLEMENTAL REASONS FOR JUDGMENT

(Filed Apr. 29, 1986)

This Court, after rendering its Judgment in the above captioned case, has been provided with additional information bearing upon one of the issues raised by petitioners. Although the Court's Judgment was reached without the benefit of this additional information, the new material supports the Court's decision and, in any event, is of such significance as to warrant inclusion in the record.

On April 28, 1986, Mr. Gerard B. Wattigny, a New Iberia attorney, furnished this Court with the transcript of an oral deposition of Mary Arceneaux taken on April 23, 1986 at St. Gabriel's penitentiary. The deposition had been taken in preparation for a civil action not directly connected with the above captioned case; nevertheless, it bears directly upon the veracity of Mary Arceneaux's affidavit used by petitioners as the cornerstone of one of their alleged grounds for post-conviction relief.

In this deposition of April 23, 1986, Mary Arceneaux testified, in effect, that her affidavit of January 28, 1986 – submitted by petitioners in their application for post-conviction relief – was false. Although she reiterated that some of her trial testimony had been false, she declared (contrary to her affidavit) that no one in law enforcement had told her how to testify nor had they known that she was testifying falsely; further, that she had been a close associate of both Alexander and Granger prior to and during the robbery-murder.

Although this Court had already rejected the entirety of Mary Arceneaux's affidavit of January 28, 1986, as unworthy of belief, this subsequent development in which she herself declared under oath, while represented by her own legal counsel, that her affidavit was false in material respects, should be included in the record. A copy of that deposition is attached hereto and is ordered made part of the record in this case.

This unforeseen development should conclusively eliminate Mary Arceneaux's recantation of her trial testimony as a basis for post-conviction relief; and, points up the validity of the long-standing legal principle that such recantations must be viewed with the utmost skepticism. *United States v. Kearney*, 682 F.2d 214 (C.A.D.C., 1982).

Officially granted and signed at New Iberia, Louisiana, this 29th day of April, 1986.

/s/ Robert E. Johnson
DISTRICT JUDGE

DAVID ALEXANDER and HARRY GRANGER	16TH JUDICIAL DISTRICT COURT
vs. NO. 71,507	PARISH OF IBERIA
JOHN WHITLEY, WARDEN, LOUISIANA STATE PENITENTIARY	STATE OF LOUISIANA

DENIAL OF APPLICATION FOR POST-CONVICTION RELIEF

(Filed Dec. 17, 1990)

On September 28, 1990, David Lynn Alexander and Harry Junius Granger, in suits 85,828 and 85,829, filed a Uniform Application for Post-Conviction Relief, and their attorney filed a memorandum in support of their application.

The trial of the defendants was conducted by the late Judge Robert E. Johnson of this Court, and they were found guilty of the crime of armed robbery, and they were sentenced to ninety-nine years at hard labor with the Department of Corrections.

This present petition was submitted to the Honorable Paul J. deMahy, successor to the division seat held by Judge Johnson. On October 15, 1990 Judge deMahy applied to the Louisiana Supreme Court to be recused because he and the convict, David Lynn Alexander, attended and graduated from Catholic High School together in 1967, and prior to becoming a judge Judge deMahy acted as an attorney for Mary Arceneaux, who was the primary state witness, and he also represented Jerry Paul Francis, who now claims he committed the subject crime. His application was granted on October 19, 1990, and a rehearing on that order was denied on October 25, 1990.

On October 26, 1990, the Court of Appeal, Third Circuit, ordered the district court to act on the application presented.

Then according to the rules of the 16th Judicial District Court for the random selection of criminal cases, the case was allotted to Edward A. delaHoussaye, Judge of Division C of this Court. By his order of October 30, 1990, Judge delaHoussaye recused himself from this case, stating that on several occasions he discussed the facts of this case and the law applicable thereto in detail with Judge Johnson during the period of time Judge Johnson was considering an earlier application for post-conviction remedies filed by these same applicants, and, therefore, may not be able to afford the parties hereto a fair and impartial trial, and recused himself under Code of Criminal Procedure Article 671 (6).

It was then reallotted at random to Division D, which is occupied by the undersigned Judge.

Considering the application for post-conviction relief filed by Alexander and Granger on September 28, 1990, the Court has determined that the petitioners' application may be disposed of without need for an evidentiary hearing.

The petitioners were jointly tried before an Iberia Parish jury in the 16th Judicial District for the crime of armed robbery and they were found guilty on September 17, 1976. They were both found guilty and they were sentenced to serve ninety-nine years in prison on October 15, 1976. Their convictions and sentences were appealed to the Louisiana Supreme Court, which affirmed the results found in the lower court. *State vs. Alexander,* 351 So.2d 505, S.Ct. (1976). A motion for a rehearing of that case was

denied by the Louisiana, Supreme Court on November 11, 1977.

A first application for post-conviction relief was filed in 1986, number 86-60190, and that application was denied without a hearing. Judge Johnson rendered a lengthy opinion. The Louisiana Supreme Court denied writs on Judge Johnson's ruling on June 20, 1986, number 86-KP-1042, and denied reconsideration on September 8, 1986.

A defendant is entitled to his day in court, and these defendants are applying for their sixth procedural remedy in court.

The present application submits seven issues that the applicants claim entitles them to post-conviction relief.

ISSUE NO. 1

The first issue claimed by petitioners in this case is that their convictions in 1976 were a direct result of the use of perjured testimony by the prosecution. After a careful review of the evidence supplied by the petitioners and the State, this Court rejects that claim since it was previously raised in the 1986 application for post-conviction relief and was denied at that time by Judge Johnson, which denial was confirmed by the Supreme Court. Any claim which has previously been raised in the trial or on appeal or in another post-conviction relief application may be denied by this Court. See Code of Criminal Procedure Article 930.4. Any allegations of perjured testimony submitted by the petitioners is found to be irrelevant and to lack merit.

After a thorough review of each recantation this Court rejects in its entirety each one as unworthy of belief. Judge Johnson in 1986 addressed these recantations in his reasons for judgment as testimony "cloaked in utmost suspicion," and this Court concurs.

ISSUE NO. 2

The applicants also claim that Constitutional error occurred during the initial hours of the investigation concerning identification procedures. It is far too late to raise this claim in a post-conviction proceeding. Even if what they allege were true, the time to raise the claim was at the trial or on appeal, and the defendants failed to do so. The record reveals that the petitioners had attorneys for their trial on this matter, and, more recently, retained counsel for an appeal and application for post-conviction relief. The record reveals that the attorneys represented the applicants in a zealous and thorough manner; any failure to file a motion to suppress the alleged improper identification is found by this Court to have been a calculated decision by the attorneys for the defendants, and in no way suggests ineffective representation. This complaint, even if valid, comes fourteen years too late.

ISSUE NO. 3

The petitioners' third claim is of a violation of their due process rights under the Fifth Amendment and Fourteenth Amendment to the United States Constitution on the basis that the prosecution knowingly used falsified evidence. After a careful review of the evidence pertaining to this claim about a tailpipe picture introduced into

evidence without objection, this Court finds that the issue is unfounded and lacks merit.

ISSUE NO. 4

The petitioners' fourth claim is that the testimony of a government agent concerning incriminating statements of an incarcerated suspect violated petitioners' Fifth Amendment rights to counsel and due process. A review of the record shows that this claim is totally unfounded and has been fully litigated in the appeals from the petitioners' convictions, (See State vs. Alexander, supra), and therefore may not be revived a second time in a petition for post-conviction relief.

ISSUE NO. 5

The petitioners' fifth claim is that government agents conspired to present perjured testimony in order to obtain petitioners' convictions. After a thorough review of the record, it is shown that these claims are unfounded and, at the very least, raise no Constitutional issues to be addressed in this post-conviction application.

The petitioners' claims that the closing arguments of the prosecutor violated Louisiana Code of Criminal Procedure Article 770 (3) and Article 774 is found to be without merit and inapplicable.

This Court finds other claims under Issue 5 are inapplicable and without merit.

ISSUE NO. 6

The sixth claim is that the prosecution of applicants involved the knowing concealment and destruction of exculpatory evidence in violation of their right to due process under the Fifth and Fourteenth Amendments of the United States Constitution. It lacks merit and is dismissed as being a new and different claim that was inexcusably omitted from their 1986 application for post-conviction relief. See Article 930.4 E.

ISSUE NO. 7

The final claim of the petitioners that their conviction was a result of ineffective assistance of counsel is unfounded. The attorneys representing the petitioners, as stated above, did so in a zealous and thorough manner. The attorneys strategically fought for the freedom of their clients. Their trial techniques showed diligence and intelligence.

It is obvious that this application, very much as the first application to Judge Johnson is concerned, indicates a very belated effort to retry the case and to try the jury that convicted the defendants, the judge that sentenced the defendants, the district attorney that prosecuted the defendants, the original defense attorneys who represented the defendants, and the witnesses who testified at the trial of the defendants. This application seeks to try everyone but the defendants.

This is old hash that was cooked at the trial, rewarmed in the Supreme Court, doubly rewarmed in an application to Judge Johnson, and now triply rewarmed in this application. The application is without any merit and

it is denied without any further hearings, as is the supplemental application filed on December 13, 1990.

Officially in Chambers at New Iberia, Iberia Parish, Louisiana, this 17th day of December, 1990.

/s/ Robert M. Fleming
ROBERT M. FLEMING, JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

DAVID LYNN ALEXANDER HARRY JUNIUS GRANGER	CIVIL ACTION NO. 91-0748
VERSUS	JUDGE DOHERTY
WARDEN, LOUISIANA STATE PENITENTIARY	MAGISTRATE JUDGE METHVIN

REPORT AND RECOMMENDATION

(Filed Feb. 10, 1992)

This petition for writ of habeas corpus was referred to me for review, report and recommendation pursuant to this court's standing order of December 19, 1991.

Petitioners, David Alexander and Harry Granger, allege that they are innocent men who are being detained illegally and unconstitutionally at the Louisiana State Penitentiary at Angola.

A. BACKGROUND

On March 30, 1976, Louis Gladu, the owner and operator of the Hasty Mart Convenience Store in Iberia Parish, was shot and killed during an armed robbery at. his store. Petitioners, along with John Nelson Collins, Sr., Ronald Earl Miller, Herbert John Derouen and Rene Jackson, were indicted on charges of armed robbery and first degree murder (Tr. 49-50). Alexander and Granger were tried together on armed robbery charges, and a jury returned guilty verdicts on September 17, 1976. On October 15, 1976, the trial court sentenced Alexander and

Granger to serve 99 years at hard labor without benefit of probation, parole or suspension of sentence. On October 20, 1977, the Louisiana Supreme Court affirmed the convictions and sentences. *State v. Alexander*, 351 So.2d 505 (La.1977).

On April 23, 1986, the state court denied petitioners' first petition for post-conviction relief. The Louisiana Supreme Court denied writs on June 20, 1986. *State ex rel. Alexander v. Blackburn*, 489 So.2d 1275, *recon. den.*, 492 So.2d 1211 (La.1986).

On December 17, 1990, the state court denied petitioners' second petition for post-conviction relief. The Louisiana Supreme Court denied writs on January 31, 1991. *Alexander v. Whitley*, 573 So.2d 1141, *recon. den.*, 576 So.2d 23 (La.1991).

B. EXHAUSTION

In its answer, the state asserts that Alexander and Granger have exhausted their state remedies except as to Issues Three and Eight, stating:

> Issue 3 includes a new claim that, under the rule of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979), there was insufficient evidence at trial to support petitioners' convictions. Issue 8 alleges ineffective defense counsel at trial and specifies at least nine new factual bases for that allegation that were not part of that issue in the state courts (labelled as Issue 7 in state courts). Petitioners' failure to afford the state courts the opportunity to consider these new allegations subjects their entire federal application to peremptory dismissal by his Honorable Court. *Burns v. Estelle*, 695 F.2d 847 (5th Cir. 1983).

(Respondent's Memorandum of Law, Record Doc. 10; page 3).

Despite the alleged failure to exhaust, the state urges the court to address these claims on the merits, and expressly waives the exhaustion requirement. In *Felder v. Estelle*, 693 F.2d 549 (5th Cir.1982), *cert. den.* 475 U.S. 1111, the Fifth Circuit held that the state may explicitly waive the exhaustion requirement in a federal habeas corpus proceeding. *Id.*, at 554; *see also*, *McGee v. Estelle*, 704 F.2d 764, 769 (5th Cir.1983).

Finding that it is in the interest of judicial economy as well as of the parties to avoid any further delay in resolution of the federal habeas claims, I conclude that a review of the merits before this court is proper. *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

There is no necessity for an evidentiary hearing since the issues may be resolved by considering the petition, the state's answer, the briefs filed by the parties and the state records. *Brown v. Jernigan*, 622 F.2d 914 (5th Cir.1980), *cert. den.* 449 U.S. 958 (1980); *Easter v. Estelle*, 609 F.2d 756 (5th Cir.1980). The Fifth Circuit has held that no evidentiary hearing is required where there are no contested issues of fact. *Passman v Blackburn*, 797 F.2d 1335, 1340 (5th Cir.1986), *cert. den.* 480 U.S. 948 (1987). There are none here.

C. ISSUES PRESENTED

Alexander and Granger seek habeas relief on the following grounds: (1) that the allegations raised in this petition are not barred by procedural default; (2) that the prosecution knowingly used falsified evidence at trial; (3)

that the evidence presented at trial was insufficient to support a conviction of armed robbery; (4) that the prosecution knowingly used false testimony at trial; (5) that the identification procedures were unconstitutionally tainted; (6) that a state's witness improperly suggested that Alexander had made a confession; (7) that the prosecution knowingly concealed and destroyed exculpatory evidence; and (8) that petitioners were denied effective assistance of counsel.

Issue One: Procedural Default

a. In General

Federal courts are generally precluded from reaching the merits of a claim if a state court declined to rule on it due to a procedural default. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Procedural default results when a defendant fails to follow a state procedural rule for a particular claim and therefore forfeits the claim. Typical examples are a failure to make a contemporaneous objection to improprieties at trial or a failure to raise an issue on direct appeal.

An exception to the procedural default bar is made if the petitioner can show "cause" for the default and "prejudice attributable thereto," *Murray v. Carrier,* 477 U.S. 478, 485, (1986), or demonstrate that the failure to consider the claim will result in a "fundamental miscarriage of justice." *Harris v. Reed,* 489 U.S. 255, 262, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Sykes,* 433 U.S. at 86-87.

A procedural default will not bar consideration of a federal claim on habeas review unless the last state court rendering a judgment in the case "clearly and expressly"

states that its judgment rests on a state procedural bar. *Harris v. Reed*, 489 U.S. at 263.

b. State Procedural History

Issue Two (falsified evidence), Issue Five (improper identification procedures), and Issue Seven (exculpatory evidence) were not raised at trial, on appeal, or in petitioners' first application for post-conviction relief (State's Volume I[1]; pages 384-392; pages 393-411; pages 308-311). Petitioners did raise the issues in their second application for post-conviction relief. (State's Volume III; pages 343-377). On December 17, 1990, the state court denied the application, finding in part:

> ISSUE NO. 2
> [Issue 5 here]
>
> The applicants also claim that Constitutional error occurred during the initial hours of the investigation concerning identification procedures. It is far too late to raise this claim in a post-conviction proceeding. Even if what they allege were true, the time to raise the claim was at the trial or on appeal, and the defendants failed to do so. The record reveals that the petitioners had attorneys for their trial on this matter, and, more recently, retained counsel for an appeal and application for post-conviction relief. The record reveals that the attorneys represented the applicants in a zealous and thorough manner; any

[1] "State's Volume" refers to items contained in blue-bound volumes attached to the State's Answer to the habeas petition. "TR" refers to copies of certain trial court records, bound in brown.

failure to file a motion to suppress the alleged improper identification is found by this Court to have been a calculated decision by is [sic] the attorneys for the defendants, and in no way suggests ineffective representation. This complaint, even if valid, comes fourteen years too late.

ISSUE NO. 3
[Issue 2 here]

The petitioners' third claim is of a violation of their due process rights under the Fifth Amendment and Fourteenth Amendment to the United States Constitution on the basis that the prosecution knowingly used falsified evidence. After a careful review of the evidence pertaining to this claim about a tailpipe picture introduced into evidence without objection, this court finds that the issue is unfounded and lacks merit.

* * *

ISSUE NO. 6
[Issue 7 here]

The sixth claim is that the prosecution of applicants involved the knowing concealment and destruction of exculpatory evidence in violation of their right to due process under the Fifth and Fourteenth Amendments of the United States Constitution. It lacks merit and is dismissed as being a new and different claim that was inexcusably omitted from their 1986 application for post-conviction relief. See Article 930.4 E.

(State's Volume II, pages 63-65).

On January 11, 1991, the state trial judge filed supplemental reasons "so that there will be no misunderstanding

as to my specific reasons for ruling." (State's Volume II, page 4). The court wrote in part:

ISSUE NUMBER 2
[Issue 5 here]

This issue which concerns the identification procedures is procedurally barred under Louisiana Code of Criminal Procedure Article 930.4 B, and under the Contemporaneous Objection Rule of Louisiana Code of Criminal Procedure Article 841. Therefore, relief is denied for reasons of procedural default. This Court also finds that the failure to raise the claim in the proceedings leading to conviction, the failure to urge the claim on appeal, or the failure to include the claim in a prior application was inexcusable and therefore need not consider the merits of the claim. Louisiana Code of Criminal Procedure Article 930.4 F.

ISSUE NUMBER 3
[Issue 2 here]

This issue which concerns the use of certain photographs at trial, and certain statements made by the prosecutor at trial, **is procedurally barred** under Louisiana Code of Criminal Procedure Article 930.4 B, and under the Contemporaneous Objection Rule of Louisiana Code of Criminal Procedure Article 941. This Court also finds that the failure to raise the claim in the proceedings leading to conviction, the failure to urge the claim on appeal, or, the failure to include the claim in a prior application, was inexcusable, and, therefore need not consider the merits of the claim. Louisiana Code of Criminal Procedure Article 930.4 F. Relief is denied for reasons of procedural default, in the alternative, this Court further denies relief on the basis that

the issue is unfounded and lacks substantive merit.

* * *

ISSUE NUMBER 6
[Issue 7 here]

This claim which concerns the alleged knowing concealment and destruction of exculpatory evidence **is procedurally barred** by Louisiana Code of Criminal Procedure Article 930.4 E, since it is a new and different claim that was inexcusably omitted from the 1986 application for post-conviction relief. Relief is denied for reasons of procedural default. This Court finds, in the alternative, that this claim also lacks substantive merit.

(State's Volume II, pages 4-7) (emphasis supplied).

On January 31, 1991, petitioners' writ application was denied by the Louisiana Supreme Court without written reasons. *Alexander v. Whitley*, *supra*, 573 So.2d 1141.

c. Did the State Rely on Procedural Default?

Petitioners assert first that the state did not clearly rely on a procedural default analysis in rejecting petitioner's claims, and that this court is therefore not precluded from reaching the merits under *Harris v. Reed*, *supra*. This argument is wholly without merit.

The language of the trial judge was both clear and express as required by *Harris v. Reed*. In fact, it is hard to imagine a clearer articulation on this point. Since the claims were rejected on grounds of procedural default by the last state court to enter a judgment, this court is

precluded from considering the claims unless petitioners make the necessary showing of "cause" and "prejudice". *Id.*

d. "Cause": Ineffective Counsel?

Petitioners argue that trial counsel was ineffective, and that this is sufficient to establish "cause". Petitioners' argument on this point is rather circular. They argue on the one hand that counsel failed to raise the claims because they were ineffective, and on the other hand that counsel was ineffective because they failed to raise the claims.

The United States Supreme Court addressed the question of whether attorney error may constitute "cause" for procedural default in *Murray v. Carrier*, *supra*.

> * * * the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default. * * *
>
> We think, then that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, *supra*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural

> rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or that "some interference by officials," . . . made compliance impracticable, would constitute cause under this standard.

Murray, 477 U.S. at 486-488 (citations omitted). *See also Enqle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), where the court noted:

> * * * Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit [certain arguments] while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not ensure that defense counsel will recognize and raise every conceivable constitutional claim.

Id., 456 U.S. at 133-134.

In order to determine whether the failure to raise the claims in question rendered petitioners' counsel constitutionally ineffective, petitioners' argument on each issue will be discussed.

Issue Two: Falsified Evidence. Petitioners claim that counsel erred in failing to call a mechanical expert to address the "loose tail pipe" issue. A careful review of the record shows this is a case of grasping at straws.

Mary Arceneaux was a key prosecution witness.[2] She testified that she heard petitioners plan the robbery, and that the next day she waited outside the store in Alexander's car while the robbery and murder were committed. After the robbery, she and petitioners drove in Alexander's car to Cypress Island. On the way back into town, the car developed a dragging tailpipe which Granger fixed with a coat hanger (Tr. 1434-35).

Captain Horace Comeaux of the Iberia Sheriff's Department provided the foundation for introduction of two photos of Alexander's car. His testimony in pertinent part is as follows:

Q. Captain Comeaux, in [State's Exhibit 6] do you observe something hanging down in the area of the tail pipe?

A. Yes, sir.

Q. And what is that particular thing?

A. It's a wire used to tie a tail pipe – loose tail pipe.

Q. I show you what has been marked as Exhibit S-8 for identification, and ask you if you recognize that photograph?

A. Yes, sir. That's –

Q. Sir?

A. Yes, sir.

---

[2] A more detailed summary of Arceneaux's trial testimony is contained on pages 16-18 *infra*.

Q. What is it?

A. That's a wire hanging down the bottom of David Alexander's car.

(Tr. 1352-53; Tr. 361-363 (Photos)). The photographs were introduced into evidence without objection (Tr. 1352-53).

As part of his closing argument, the district attorney said:

> * * * As it began to get dark they started on back, and as they were coming out on the road, you remember the problem with the loose tail pipe? It was making noise, and the defendant, Alexander, told Granger to get out there and tie it with a coat hanger which was in the car, which he did, and we've seen a picture of the wire, which was probably done somewhat later to replace the coat hanger to hold the loose tail pipe. Not very effective, because it's still hanging loose. * * *

(Tr. 1725-26).

Petitioners argue that trial counsel should have called an expert witness to challenge the photographs. Petitioners suggest that an expert would have said two things: first, that the tailpipe was not tied up with a wire, but was "firmly bracketed to the muffler" (Memorandum in Support of Petition, p. 18); second, that what the witnesses and the district attorney referred to as "wire" in the photographs is actually a piece of fiber rope (*Id.*). Petitioners assert that such expert testimony would have destroyed the only corroborating evidence for Mary Arceneaux's testimony, revealing her as a perjurer.

Petitioners' argument is meritless. First, no witness actually testified that the photographs depicted a loose tailpipe. Captain Comeaux stated only that a wire could be seen hanging down from the underside of the car – "It's a wire used to tie a tail pipe – loose tail pipe."

Second, the photos were published to the jury immediately after their introduction into evidence (Tr. 1354). The jury could determine for themselves whether there were any material discrepancies between the photographs and the testimony.

Third, even if an expert established that the tailpipe was not loose and that the "wire" was a "rope", the burning question remains, "so what?" The jury would then be able to infer what they probably inferred anyway: that the coat hanger had been replaced with a rope, that the tailpipe had been repaired since the robbery, and that Captain Comeaux mis-spoke when he said "wire."

Alexander himself testified at trial that his car had developed a loose tailpipe, although he claimed it was repaired before the robbery. When asked about one of the photographs showing the underside of his car, he replied, "the *wire* been on there, you know, a long time" (Tr. 1658, emphasis supplied).

Petitioners would have this court conclude that the prosecution fabricated the evidence to corroborate Mary Arceneaux's testimony. Even if there were a shred of support in the record for this suggestion, which there is not, it makes no sense. If the prosecution were going to fabricate photographs of Alexander's car to corroborate Mary Arceneaux's testimony, surely they would have used a coat hanger under the car rather than a rope or wire,

and surely they would have had the coat hanger clearly wound around a tailpipe.

The prosecutor's remark in closing that the tailpipe was still "hanging loose" may or may not have been accurate. Even if it was a misstatement, however, the remark affords no grounds for habeas relief absent a showing that it deprived petitioners of a fundamentally fair trial. *Byrne v. Butler,* 845 F.2d 501, 507-508 (5th Cir.), *cert. den.* 487 U.S. 1242 (1988). In light of the overwhelming evidence against petitioners, and jury instructions that arguments of counsel were not evidence, the prosecutor's remark was immaterial and harmless.

In conclusion, petitioners have failed to show any attorney error as to Issue Two, and certainly none which breaches the constitutional standard. Thus, there is thus no showing of "cause" due to ineffective assistance of counsel which would overcome the procedural default on this issue.

Issues Five and Seven. Petitioners fail to allege or show how trial counsel was constitutionally ineffective in connection with these two issues. There is only the general argument that counsel must have been ineffective because these claims were not raised earlier. Nothing in the record indicates that counsel made an error in connection with these claims. Even if counsel erred, through ignorance or inadvertence, such error is insufficient to establish "cause" for a procedural default. *Murray v. Carrier, supra,* 477 U.S. at 488. Because petitioners have failed to show "cause" for the procedural default, this court is precluded from consideration of Issues Five and Seven on the merits.

e. Conclusion

Petitioners offer no other "cause" for the procedural defaults on Issues Two, Five and Seven other than their claim of ineffective assistance of counsel. Neither the facts nor the law support this claim. Petitioners have shown no "cause" for the default or "prejudice attributable thereto," *Murray v. Carrier*, *supra*, 477 U.S. at 485, and this court's refusal to consider the claims will not result in a "fundamental miscarriage of justice", *Harris v. Reed,* 489 U.S. at 262. I therefore conclude that this court is precluded from consideration of Issues Two, Five and Seven due to petitioners' procedural default.

Issue Three: Insufficient Evidence

Alexander and Granger contend that the evidence was not sufficient to support a conviction of armed robbery. The Fifth circuit has stated:

> The Due Process Clause of the Fourteenth Amendment permits the conviction of a criminal defendant only when the state proves every necessary fact "beyond a reasonable doubt." *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). When a defendant seeking federal habeas relief contends that the evidence is insufficient to support a state court conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789,

> 61 L.Ed.2d 560 (1979) (emphasis in original); *Porretto v. Stalder,* 834 F.2d 461, 467 (5th Cir.1987).

Gibson v. Collins, 947 F.2d 780, 781 (5th Cir.1991).

The court also stated that great weight must be given to the state court's findings. *Gibson,* 947 F.2d at 782; *citing Porretto,* 834 F.2d at 467.

In this case, Alexander and Granger were convicted of armed robbery. Under LSA-R.S.14:64:

> Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

The Louisiana Supreme Court, in affirming petitioners' convictions, said:

> [The] remaining allegations raise an evidentiary issue, that is, if the evidence supports the conviction. Such a contention does not raise a reviewable question of law on appeal unless there is a total lack of evidence to prove the crime or an essential element thereof. *State v. Perkins,* 337 So.2d 1145 (La. 1976); *State v. Williams,* 310 So.2d 513 (La. 1975). A review of the record convinces us that there is some evidence of the crime and its essential elements. Witnesses testified that the defendants planned the robbery of a store; that a customer paid cash for purchases shortly before the defendants entered, that the defendants entered the store and exited, running; that minutes after they fled, another customer discovered the cash register open

containing only a few nickels and pennies, with the spring clips in the upright position.

These assignments of error are without merit.

State v. Alexander, 351 So.2d 505, 514 (La.1977).

At the trial, Captain Horace Comeaux of the Iberia Parish Sheriff's Department testified that on March 30, 1976, he participated in an investigation at the Hasty Mart in Iberia Parish. Comeaux arrived at the Hasty Mart at 3:15 p.m. and found the store's owner, Louis Gladu, lying on the floor with blood in his right nostril, a laceration on his head and blood on his shirt. The cash register was open and contained only some loose change, no bills or checks (Tr. 1342-1350).

Katherine Eldridge testified that on March 30, 1976 she went to the Hasty Mart at approximately 2:55 p.m. She discovered Gladu bleeding on the floor. The counter was "very messy" (Tr. 1386). She immediately called the operator to get in touch with the sheriff's department and to call for an ambulance (Tr. 1380-1387).

The prosecutor read to the jury the testimony of Ellen Kay Abney taken at a preliminary hearing. Abney stated that on March 30, 1976, she saw a dark blue car pulling away from a barn located near the Hasty Mart. Abney stated that there were four black people in the car. This occurred shortly before 3:00 p.m. (Tr. 1399-1406).

Evelyn Babin testified that on March 30, 1976, she went to the Hasty Mart at approximately 2:15 p.m. and purchased $3.00 worth of gas, a battery and some candy from Gladu. Babin stated that she paid with cash and left the Hasty Mart at 2:30 p.m. (Tr. 1409-1410).

Mary Arceneaux testified that she was with Alexander, Granger, and four other men when the robbery and murder occurred. Six days later, she reported the crime to the Sheriff's office because "I could live with the robbery, but not the murder" (Tr. 1438-39). Arceneaux admitted she was on parole for a forgery conviction, and was testifying in exchange for immunity from prosecution on the murder and robbery charges, as well as on a worthless check charge (Tr. 1440-42).

Arceneaux testified that in March 1976 she had known Alexander for a little over a year. On March 29, 1976, Arceneaux overheard Alexander talking to Granger about robbing a store while they were riding in a car together. Both Alexander and Granger had handguns. While Arceneaux stayed in the car, she saw Alexander and Granger speaking to Herbert Derouen and John Nelson Collins in the street for about 15 minutes. Alexander and Granger returned to the car and drove Arceneaux to her home (Tr. 1411-1420).

Arceneaux stated that the next day, March 30, Alexander picked her up in his car, in which Granger and Collins were already passengers. Alexander drove to the Hasty Mart and went in for a short time. When he returned, he stated that everything was "A-okay" (Tr. 1425). Alexander then drove to an area a short distance from the Hasty Mart and parked the car. Alexander, Granger and Collins got out of the car and Arceneaux stayed in the car. Arceneaux saw that Alexander and Granger had weapons. She also saw the three men walk to and enter the Hasty Mart. When Alexander and Granger returned to the car, they were running. Alexander was holding a nickel-plated handgun and had blood on his hand. Granger told Alexander "you didn't waste him enough" (Tr. 1431). Collins did

not return to the car. Alexander removed his T-shirt, wrapped the gun in it and placed the gun on the floor of the car. Alexander drove the car away from the scene. Arceneaux testified that she was nervous and "knew it was a robbery, and then after they said they had killed a man" (Tr. 1432).

Herbert John Derouen testified as a state's witness in exchange for immunity from prosecution on robbery and murder charges. Derouen testified that on March 29, 1976, he, Alexander, Granger, Collins, Miller and Jackson planned to rob the Hasty Mart on the following day. On March 30, 1976, Derouen, Miller and Jackson drove to the Hasty Mart in a taxi. Alexander, Granger, Collins and Arceneaux drove in a blue car. The latter group went into the Hasty Mart first, followed by Derouen, Miller and Jackson. Derouen was standing by the door. Alexander was standing by the counter talking to Gladu. Derouen saw Alexander pull out a gun from his belt and shoot Gladu twice. Derouen then ran out of the store (Tr. 1454-1469).

The state accurately summarizes other trial events:

> A prosecution attempt to connect the robbery weapon with the defendant Alexander came to naught when state's witness Preston Demouchet became recalcitrant and testified that he knew nothing of the weapon [Tr. 1518]. After being declared a hostile witness, Demouchet asserted that he had been coerced into his initial cooperation with the investigators [Tr. 1520-1524]. Another state's witness, Jerry Paul Francis, called for the same purpose, refused to testify on the grounds of self-incrimination [Tr. 1528-1531]. Both Demouchet and Francis were awaiting trial for a series of armed robberies [Tr. 1517, 1528].

> The defense produced one Malcolm Roy who testified that Demouchet and Francis were the true perpetrators of the Hasty Mart crime, and that he had been their driver [Tr. 1566-1581]. He admitted having made prior inconsistent statements in this regard, but insisted that his trial testimony was correct [Tr. 1694-1696]. (NOTE: Roy was later charged with perjury as a result of this testimony; he pleaded guilty and was sentenced to prison. [State's Volume I, p. 241; Vol. III, p. 483].
>
> The defense offered one alibi witness, who testified that she had been a passenger in the defendant Alexander's taxi on the afternoon of the crime [Tr. 1540-1542]. Cross-examination, however, cast doubt upon the accuracy of her recollection of this incident [Tr. 1545-1557].
>
> Defendant Granger chose not to testify. Defendant Alexander testified that he did not know Mary Arceneaux and that he had never been to the Hasty Mart. He denied ever admitting that he had shot Mr. Gladu [Tr. 1650-1673].
>
> Andrus "Peanut" Wilson, was called by the state to rebut Alexander's denials. After being sworn, Wilson refused to testify. [Tr. 1685, 1689].

(Respondent's Memorandum of Law, Record Doc. 10, p. 2-4).

The jury was able to consider the relative credibility of the witnesses at trial, together with all other evidence. In order to obtain habeas relief on grounds of insufficiency of the evidence, petitioners must show that no rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could find petitioners guilty of armed robbery beyond a reasonable doubt. *Jackson v. Virginia,*

supra, 443 U.S. at 319. Petitioners fall far short of this showing, and I conclude that habeas relief on this ground is unwarranted.

Issue Four: Perjured Testimony

a. The merits.

Petitioners allege that Mary Arceneaux and Herbert Derouen gave perjured testimony at trial with full knowledge of the prosecution. In support of this claim, petitioners point to affidavits and depositions provided by Arceneaux and Derouen nine years later, recanting their trial testimony.

In January 1986, Arceneaux and Derouen signed affidavits stating that their trial testimony against petitioners had been false (State's Volume III, p. 460, 461). Arceneaux stated that in fact, she did not know petitioners prior to their arrest on the armed robbery charges, and that she had been paid and coached by members of the Iberia Parish Sheriff's Department to testify as she did at trial.

Several months later, on April 23, 1986, Arceneaux gave a deposition in an unrelated case in which she again recanted her trial testimony, but with a new and contradictory version of events. In the deposition, Arceneaux testified that she was with petitioners on the day of the robbery and murder (i.e. she *did* know them); that petitioners did in fact enter the Hasty Mart on that day; that Alexander came out a few minutes later and told her to come see what happened; that she entered the Hasty Mart and saw Mr. Gladu lying dead on the floor; that Preston Demouchet had appeared from somewhere; that Demouchet

and Jerry Paul Francis killed Mr. Gladu, though she didn't see them go into the store or fire the shots; that later Alexander inexplicably told Arceneaux to blame the murder on him (State's Vol. I, p. 85, 120-122).

Derouen's affidavit of January 29, 1986, states that he was beaten by unidentified members of the Iberia Parish Sheriff's office, and told what to say at petitioner's trial.

In a deposition taken September 23, 1986, Derouen provided confusing, senseless testimony in an effort to establish that he lied at petitioners' trial (State's Vol. II, pp. 262-309). In the deposition, Derouen testified that an unknown deputy sheriff beat him after his arrest – not to get him to offer false testimony against petitioners, but because Derouen wanted to stand up for his interview and the deputy wanted him to sit down (State's Vol. II, p. 272-276). Derouen repeatedly stated that he was told if he did not tell the *truth* at petitioners' trial, he would be sent to prison. He also repeatedly stated that he lied at the trial, but could not say why, other than "I don't know" or "I was scared". Derouen also was unable to explain how he could show investigators where Gladu's body had fallen, or other details of the crime if he had not been there.

Due process requirements of fundamental fairness prevents the prosecution from obtaining a defendant's conviction through the knowing use of perjured testimony. *U. S. v. Agurs*, 427 U.S. 97 at 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Petitioners bear the burden of proving (1) that the testimony was false, (2) that the prosecution knew it was false; and (3) that the false testimony was material to the issue of their guilt. *Little v. Butler*, 848 F.2d 73, 76 (5th Cir.1988). The Fifth Circuit has stated:

> [This court] has long abided by the standard requiring that for use of perjured testimony to constitute constitutional error, the prosecution must have knowingly used the testimony to obtain a conviction.

Smith v. Black, 904 F.2d 950, 961 (5th Cir.1990) (Citations omitted).

The depositions themselves refute the claim that the prosecution *knowingly* used perjured testimony at petitioners' trial. Arceneaux stated in her deposition that there was no difference between her trial testimony and her statements to the Iberia Parish Sheriff's Department, her statements to the assistant D.A., and her grand jury testimony. (State's Volume I, pp. 104-105; 109-110; 134).

Derouen testified at his deposition that no one from the district attorney's office or the sheriff's office instructed him to lie on the witness stand. (State's Volume II, p. 292). Derouen also stated that during the trial, he never informed the district attorney's office or the sheriff's office that he was giving false testimony. (State's Volume II, p. 304).

Based on the foregoing, I find that petitioners fail to show that the prosecution knowingly used false testimony. It is unnecessary, therefore, to consider the remaining two elements under *Little v. Butler, supra.* "[R]esolving the allegations of perjury is unnecessary if the prosecution did not know of the perjury." *Smith v. Black, supra,* 904 F.2d at 961.

b. Presumption of Correctness

The claim of perjured testimony has been exhaustively reviewed by the state courts in 1986 and 1990 in connection with petitioners' applications for post-conviction relief in connection with the 1986 application, the trial judge considered the affidavits, depositions and pleadings submitted by the parties, and provided detailed reasons for rejecting this claim, among others (State's Vol. I, pp. 51-84).

The trial judge found that recantations unpersuasive. Among the reasons provided were that certain particulars of Arceneaux's trial testimony were corroborated by Mr. Gladu's neighbors or customers; that both Collins and Miller (who Arceneaux and Derouen both testified were at the scene of the robbery) later pled guilty to being accessories after the fact to the Hasty Mart robbery; that Arceneaux provided the affidavit recanting her trial testimony to petitioners' legal counsel while she was in jail; that Derouen's affidavit was related to the fact that he and four other participants in the Hasty Mart robbery (including petitioners) had retained the same legal counsel in anticipation of filing a damage suit; that Derouen's trial testimony was corroborated in all material respects by other evidence and testimony; and that the trial judge had closely observed both Derouen and Arceneaux at trial, and had been satisfied they were telling the truth.

When a state court has provided a full and fair hearing on a claim, a federal habeas court must accord a presumption of correctness to the state court's written findings of fact. 28 U.S.C. §2254(d); *Sumner v. Mata,* 449 U.S. 539 (1981); *United States ex. rel Jones v. De Robertis,*

766 F.2d 270, 272-73 (7th Cir. 1985); *King v. Collins,* 945 F.2d 867 (5th Cir.1991).

After a careful review of the state court's findings of fact on this issue, I conclude that petitioners' have been afforded a full and fair hearing, and that the state court's findings should be accorded a presumption of correctness. Petitioners have failed to rebut this presumption.

In conclusion, I find that habeas relief cannot be afforded on this ground.

Issue Six: Involuntary Confession

Petitioners contend that the prosecution allowed a witness, Andrus "Peanut" Wilson, to improperly suggest that Alexander had confessed to the crime while the two were cellmates at the Crowley jail. The trial transcript shows that the prosecution called Wilson to the stand as a rebuttal witness after Alexander testified in his own behalf.

Alexander testified that he was not involved in the Hasty Mart robbery, and that he had been elsewhere at the time of the crime. Upon cross-examination by the prosecutor, Alexander admitted that he was incarcerated following Gladu's murder at the Crowley jail on April 10, 1976, and that Andrus Wilson was his cellmate (Tr. 1663). Alexander testified that his conversations with Wilson were free and voluntary (Tr. 1669). Alexander denied admitting to Wilson that he had robbed and murdered Mr. Gladu (Tr. 1673).

Having prepared the way for Wilson's rebuttal testimony, the prosecutor was dismayed to discover that Wilson had had a change of heart, as indicated by the record:

[BY THE PROSECUTOR]

Q. Where were you on the 10th of April, 1976?

[BY ANDRUS]

A. Crowley city jail.

Q. When did you first meet Alexander?

A. On the 10th in the Crowley jail.

Q. On that day?

A. Yes, Sir.

Q. How did you happen to meet him?

A. Well, I was in the cell by myself, locked up, so the man brought the dude up, so we rapped.

Q. They put you in the same cell?

A. Yes, Sir.

Q. Was anybody else in that cell?

A. No, Sir.

Q. You say you all rapped?

A. Yes, Sir.

Q. What did he tell you about himself?

A. Well, you know, he walked in, so I didn't talk to him – I asked him what he was in there for, so – I told him, you know, what I was in there for, you know, so he told me that – well, they charged me on armed robbery and murder.

Q. What did he tell you about that crime?

A. Well, you know, so, he say, well, they, you know, they charged me – they charged me with armed robbery and murder. That's what he told me about it.

Q. What did he tell you about it?

A. About it? Well, he just told me, you know, that – so they charged him with it.

Q. Did he tell you that he had done it?

A. Sir?

Q. Did he tell you about how he did it?

A. How he did it?

Q. Yes.

A. (Witness shakes head negatively)

Q. Are you going to answer the question?

A. Well – well, no, man. I – really – I not testify on nobody. So I not – I not going to tell you about it.

(Tr. 1684-1685).

When the prosecutor requested that the judge instruct Wilson to testify, the judge excused the jury. The prosecutor then informed the judge that since Wilson had "had a change of heart after coming into the courtroom, the State would excuse Wilson as a witness" (Tr. 1687).

The Louisiana Supreme Court considered and rejected this ground on appeal:

The defendants' allegation that the state improperly introduced Alexander's inculpatory statement has no factual basis. As shown by Wilson's testimony above, the statement was never introduced into evidence. Thus, the argument lacks merit.

Assuming that Wilson testified as to the contents of the statement, we hold that the trial court properly admitted it. In *State v. Turner,* supra, we explained the relevant rules on the introduction of evidence in the State's rebuttal as follows:

> "The state may not reserve part of its case-in-chief for rebuttal testimony, after the defense has put on its case and when it can no longer present evidence to rebut the state's case. This is contrary to statute, to ancient jurisprudence, and to rules of fair play.

"In *State v. Monroe,* 205 La. 285, 17 So.2d 331, 332 (1944), we noted: 'Rebutting evidence is that which is offered to explain, repel, counteract, or disprove facts given in evidence by the adverse party.' (Italics [theirs].) Again, in *State v. Smith,* 120 La. 530, 532, 45 So. 415 (1908), we noted that rebuttal evidence is 'evidence which has become relevant or important only as an effect of some evidence introduced by the other side.'" [Citations omitted.]

Further, we recognized the following situation in our second footnote:

"Of course, a confession or an inculpatory statement may be independently admissible in rebuttal, such as being proof of a prior contradictory statement if the accused takes the stand in

his defense and denies having made it. *State v. Scott,* 320 So.2d 538 (La.1975)."

This Court concludes that this latter rule governs the admissibility of the inculpatory statement in this case. The defendant Alexander's denial of making the inculpatory statement and denial of any implication in the crime are facts which the State may rebut. *State v. Brooks,* 294 So.2d 503 (La.1974), and the cases cited therein. See *State v. Watkins,* 340 So.2d 235 (La.1976). At trial, the State offered and the court accepted Wilson's testimony for impeachment purposes only. The State introduced sufficient evidence during its case-in-chief to carry its burden of proof; it did not use this statement to prove its case. See *State v. Hatter,* 338 So.2d 100 (La.1976).

These assignments of error are without merit.

State v. Alexander, supra, 351 So.2d at 512 (La.1977).

Upon review of the record as a whole, I find that the inculpatory statement was never introduced into evidence. I also conclude that petitioners have been accorded a full and fair hearing on this issue, and the state court's findings are entitled to a presumption of correctness.

Even assuming the statement was introduced, the Fifth Circuit has stated "extra-judicial admissions, voluntarily made, are admissible in evidence." *U. S. v. Ballard,* 779 F.2d 287, 291 (5th Cir.1986), *cert. den.* 475 U.S. 1109 (1986). Alexander testified that the conversations he had with Wilson were free and voluntary. There is no showing that Alexander was motivated by fear or coercion which would render any confession involuntary. *See Arizona v.*

Fulminante, ___ U.S. ___, 111 S.Ct. 1246, 113 L.Ed.2d 302, 59 U.S.L.W. 4235 (March 26, 1991).

For the foregoing reasons, I conclude that habeas relief is not warranted on this ground.

Issue Eight: Ineffective Counsel

Alexander and Granger contend that they were denied effective assistance of counsel.

Alexander asserts that his attorney: (1) failed to object to the introduction of falsified evidence; (2) failed to make a contemporaneous objection to the prejudicial testimony of Andrus Wilson; (3) failed to introduce the confessions of Jerry Paul Francis and Preston Demouchet; (4) failed to introduce the statement of James McVeal and Jerry Paul Francis; (5) failed to challenge Arceneaux's testimony; and (6) failed to object to the unconstitutional identifications of Derouen, Alexander and Granger by Arceneaux.

Granger asserts that he was denied effective assistance of counsel because his attorney did not conduct an investigation and did not introduce evidence at trial.

In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established a two-prong test for determining whether a petitioner is entitled to relief on the grounds that his counsel rendered ineffective assistance: 1) counsel's performance must be deficient, and 2) the deficient performance must have prejudiced the defense. The burden is on the petitioner to show that counsel's representation fell below an objective standard of reasonableness. *Id.*, at p. 688. The court's scrutiny should be "highly deferential" and the court must apply "a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance." *Id.*, at p. 689-690; *Marler v. Blackburn,* 777 F.2d 1007, 1010 (5th Cir.1985). The court further outlined the extent of prejudice that must be established by the defendant:

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of the criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison,* 449 U.S. 361, 364-365 (1981). * * *
>
> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine confidence in the outcome. * * *
>
> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. * * *

Strickland, supra at pp. 691, 694-695. *See also Taylor v. Maggio,* 727 F.2d 341 (5th Cir.1984); *U.S. v. Diaz,* 733 F.2d 371 (5th Cir.1984).

A careful review of the record shows that trial counsel was extremely knowledgeable, thorough, and zealous throughout the course of the case. The evidence against petitioners was overwhelming. The trial deficiencies cited by petitioners are either unsupported by the record, or constitute strategic decisions made by able counsel. There is nothing whatsoever in the record to support petitioners claim that trial counsel was deficient. Consequently, relief under *Strickland* is unwarranted.

CONCLUSION

Considering the foregoing, I recommend that petitioners' application for habeas corpus relief be denied and that this suit be dismissed.

Under the provisions of 28 U.S.C. §636(b)(1)(C), the parties have ten (10) days from receipt of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the District Judge prior to a final ruling. FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATION CONTAINED IN THIS REPORT WITHIN TEN (10) DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDINGS ON APPEAL.

Lafayette, Louisiana, this 11th day of February, 1992.

/s/ Mildred E. Methvin
MILDRED E. METHVIN
United States Magistrate
Federal Building, #207
Lafayette, La. 70501

(318) 264-6651

COPY SENT
DATE 2-11-92
BY MS
TO: Calahan
Alexander
Boudreaux
Granger

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

DAVID LYNN ALEXANDER HARRY JUNIUS GRANGER	CIVIL ACTION NUMBER: 91-0748
VERSUS	JUDGE DOHERTY
WARDEN, LOUISIANA STATE PENITENTIARY	MAGISTRATE JUDGE METHVIN

JUDGMENT

(Filed Mar. 12, 1992)

This matter was referred to United States Magistrate Judge Mildred E. Methvin for her Report and Recommendation. After an independent review of the record in this case, the Court concludes that the Report and Recommendation of the Magistrate Judge is correct and this Court adopts the conclusions of the Magistrate Judge and further states additional reasons included herein.

IT IS ORDERED, ADJUDGED AND DECREED that petitioners' application for habeas corpus relief be DENIED and that this suit be DISMISSED.

Lafayette, Louisiana this 12 day March, 1992.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

DAVID LYNN ALEXANDER HARRY JUNIUS GRANGER	CIVIL ACTION NUMBER: 91-0748
VERSUS	JUDGE DOHERTY
WARDEN, LOUISIANA STATE PENITENTIARY	MAGISTRATE JUDGE METHVIN

REASONS FOR JUDGMENT

(Filed Mar. 12, 1992)

The matter of David Lynn Alexander and Harry Junius Granger's petition for habeas relief from their 1977 conviction for armed robbery, LSA – R.S. 14:64, this Court cites in addition to the Magistrate's Report and Recommendation additional reasons for judgment.

B. EXHAUSTION

This Court agrees with the Report and Recommendation of the Magistrate that no evidentiary hearing is required in this matter. Petitioners seek an evidentiary hearing based, among other claims, on the specific claims of perjured testimony and prosecutorial misconduct. An evidentiary hearing is not required merely based on petitioners' allegations. *Young v. Herring,* 938 F.2d 543, (5th 1991), *Koch v. Puckett,* 907 F.2d 524 at 531 (5th Cir. 1990). The record as a whole does not support petitioners' allegations. Further, the primary thrust of petitioners' argument is one of credibility, which does not require an evidentiary hearing some 15 years after petitioners' conviction for armed robbery. *Koch,*

supra at 531; *Little v. Butler,* 848 F.2d 73, 76 (5th Cir. 1988).

ISSUES FIVE AND SEVEN

Petitioner's general argument that trial counsel was ineffective because he failed to raise these issues in prior applications, i.e., (identification procedures were unconstitutionally tainted, and the knowing concealment and destruction of its exculpatory evidence by prosecution), does not rise to the level of "cause" for procedural default, required by *Murray v. Carrier,* 477 U.S. 478 (citations omitted) (1986). Petitioners cannot show the required external factor, external to the defense, which so impeded counsel's efforts to comply with the State procedural rules. *Murray, supra.*

Additionally, as to petitioners' argument of ineffective counsel within the collateral proceedings, adequacy of counsel in a state habeas proceeding cannot form the basis of federal habeas relief. The state has no constitutional duty to provide counsel in collateral proceedings. *Green v. McGougan,* 744 F.2d 1189 at 1190 (5th Cir. 1984); *Jones v. Estelle,* 722 F.2d 159, 167 (5th Cir. 1983).

ISSUE 4 – PERJURED TESTIMONY

a. The Merits

In conjunction with the Magistrate's discussion at page 20, this Court wishes to note and direct review to Volume I, p. 101 of State's Exhibit where "Bro" is identified as "Bro" Alexander in Mary Arceneaux's deposition of April 23, 1986.

AMENDED PETITION

Petitioners' claim, in their objection to the Magistrate's Report and Recommendation, that the State and the Magistrate both failed to address the amended petition for writ of habeas corpus filed on May 6, 1991. This court finds that these additional issues were properly addressed, although albeit, not specifically in the Report and Recommendation of the Magistrate, in the State's response and in the record as a whole. Nonetheless, this Court fully reviewed the amended petition, its allegations and the relevant record and finds these were addressed by the Magistrate and the State in its response to the amended petition.

In particular, Issues Two and Seven, falsified evidence knowingly used by the prosecution at trial and failure to disclose exculpatory evidence, are procedurally barred under Louisiana Code of Criminal Procedure, Article 930.4(B), Article 841, and Article 930.4(E). Further, the record does not reflect the required "cause" and "prejudice" required under *Harris v. Reed,* 489 U.S. 255, 262, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) for this Court to reach the merits on these issues.

The record clearly reflects and the Magistrate indicates at Page 17 of the Report and Recommendation, that the jury was instructed as to Mary Arceneaux's status and the fact that she was testifying in exchange for immunity from prosecution in this case, as well as a worthless check charge. (Tr. 1439 – 1452, 1747 – 1753). Further, the transcript also reflects the trial judge discussed witness credibility with the jury in his charge. (Tr. 1811 – 1813).

Petitioners' Issue Three in the amended petition, failure to convict beyond a reasonable doubt, was fully

discussed by the State and the Magistrate. Therefore, this issue is encompassed by the record as a whole and was evaluated in relation to the standard for insufficiency of evidence as stated in *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

Therefore, after an independent review of the record in this case, the Report and Recommendation of the Magistrate Judge and the additional reasons for judgment stated herein, petitioners' application for habeas relief is therefore DENIED.

THUS DONE AND SIGNED in chambers this 12 day of March, 1992 at Lafayette, Louisiana.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT
JUDGE

DAVID ALEXANDER	**16th JUDICIAL**
and	**DISTRICT COURT**
HARRY GRANGER	**PARISH OF IBERIA**
vs. No. 26375 D	**STATE OF LOUISIANA**
BURL CAIN, Warden, Louisiana State Penitentiary	

REASONS FOR JUDGMENT

(Filed Sept. 18, 2001)

In order that petitioners' latest allegations may be viewed in their proper context, this Court refers to a summary of the evidence presented by both the prosecution and the defense at petitioners' trial in 1976 (Vol. IV, p.75-78).

Petitioners, David Alexander and Harry Granger, were convicted in September 1976 following their joint trial in Iberia Parish for an armed robbery in which a storekeeper was killed. Each was sentenced to serve ninety-nine years at hard labor without benefit of parole, probation, or suspension of sentence. The Louisiana Supreme Court affirmed the convictions and sentences on October 21, 1977. *State v. Alexander and Granger*, 351 So.2d 505 [La. 1977] (Vol. 1, p.336).

The issues raised on direct appeal (Vol. I, p.338 *et seq.*), all decided adversely to the appellants, were:

1. The trial court refused to require the State to provide defense counsel with the substance of Alexander's oral inculpatory statement;

2. The trial court denied defense counsel a pre-trial review of inculpatory statements made by others implicated in the crime;

3. In the presence of the jury, the prosecutor referred to other crimes charged against defendants;

4. The trial court improperly restricted defense *voir dire* of a prospective juror;

5. The trial court improperly sustained the State's objection to a witness's opinion testimony;

6. The State's notice of intent to use incriminating statements against defendant Alexander was legally sufficient;

7. The State improperly introduced an inculpatory statement made by defendant Alexander to his cell mate;

8. The trial court erred in sustaining the State's objections to defense introduction of more than two hundred photographs of an armed robbery of the bank in Parks, Louisiana;

9. The trial court erred in sustaining the State's objection to the defense attempt to introduce a document styled "*Disclosure by the State*;"

10. The ends of justice demand a new trial, and the verdict is contrary to the law and evidence.

On October 5, 1983, attorney Philip E. O'Neill, of Gretna, Louisiana, filed, in 16th Judicial District Court, a Motion for New Trial on behalf of David Alexander (Vol. IV, p.1). this motion claimed that persons other than Alexander and Granger had committed the crime and were willing to testify to that effect. The motion included

an affidavit by one Ronald Lauland, private investigator-deputy sheriff, who swore to the truth of the allegations therein (Vol. IV, p.3).

On October 26, 1983, Judge Robert E. Johnson denied the O'Neill motion as untimely (Vol. IV, p.5). Mr. O'Neill did nothing further on Alexander's behalf, but was allowed by other retained counsel who applied for post conviction relief in subsequent years.

In 1986, petitioners, represented by attorneys H. Alva Brumfield, III, and Timothy Screen, both of Baton Rouge, applied for post conviction relief in the 16th Judicial District Court (Vol. I, p.308). The issues raised in that application were:

1. The State knowingly used perjured testimony at trial;
2. Newly-discovered evidence;
3. Ineffective defense counsel at trial;
4. The trial court erred in refusing to accept a defense investigator's lie detector results.

That first application for post conviction relief was denied on April 23, 1986, by the Honorable Robert E. Johnson, now deceased, who had presided over petitioners' joint trial (Vol. I, p.53). The Louisiana Supreme court, on June 20, 1986, denied an application for supervisory writs (Vol. I, p.1), and, on September 8, 1986, refused reconsideration (Vol. I, p.5).

On September 28, 1990, petitioners again applied for post conviction relief in the 16th Judicial District Court (Vol. III, p.343). In this second application, they were

represented by P. Charles Calahan, retained counsel, of New Iberia. He raised the following issues:

1. The State knowingly used perjured testimony at trial;
2. Unconstitutional pre-trial identification of defendants;
3. The State used false evidence at trial;
4. State's use of an informer to incriminate Alexander;
5. a) The State's agents were guilty of "egregious" misconduct, and,
   b) The State's closing argument was prejudicial;
6. The State concealed exculpatory evidence;
7. Ineffective defense counsel at trial;
8. The crime charged against petitioners was committed by others.

The trial judge having died in 1986, and his successor judge having been recused from the case, this second application was referred by random selection to Division D of the 16th Judicial District Court – a position then occupied by the Honorable Robert M. Fleming (Vol.II, p.61). Judge Fleming retired in 1994 and Division D is now occupied by the undersigned Judge. On December 17, 1990, Judge Fleming denied the application (Vol.II, p.66). On January 2, 1991, petitioners sought supervisory writs from the Louisiana Supreme Court (Vol.II, p.30). On January 11, 1991, Judge Fleming issued Supplemental reasons for Judgment (Vol.II, p.4). On January 31, 1991, the Louisiana Supreme Court denied writs (Vol.II, p.1).

Reconsideration was denied on March 1, 1991 (Vol. II, p.1 A 1).

Petitioners then filed for a writ of habeas corpus on April 15, 1991, in the United States District Court for the Western District of Louisiana (Vol.IV, p.6). The magistrate judge in that court listed petitioners' issues as follows (Vol. IV, p.102):

1. Current allegations are not procedurally barred;
2. State knowingly used false evidence at trial;
3. Insufficient evidence to support convictions;
4. State knowingly used false testimony at trial;
5. Unconstitutional pre-trial identifications;
6. State witness improperly suggested Alexander had confessed;
7. State concealed and destroyed exculpatory evidence;
8. Defense counsel at trial were ineffective.

On March 12, 1992, the federal district court denied the application for habeas corpus (Vol. IV, p.134). When petitioners filed notice of appeal, the United States District Court denied the application for a certificate of probable cause (Vol. IV, p.135). The United States Court of Appeals for the Fifth Circuit eventually granted a certificate of probable cause, and petitioners appealed to that court (Vol. IV, p.137). On May 13, 1993, the Fifth Circuit affirmed the lower court's denial of habeas corpus relief (Vol. IV, p.139), and, on June 9, 1993, denied an application for rehearing (Vol.IV, p.144).

On August 1, 1993, petitioners applied to the United States Supreme Court for a writ of certiorari. This application was denied on November 1, 1993. *Alexander and Granger v. Whitley*, 114 S.Ct.. 395 [1993] (Vol. IV, p.145)

This latest application for post conviction relief alleges that the State suppressed forty-one separate items of exculpatory evidence, knowingly used the perjured testimony of six witnesses, and committed an additional five "due process violations." These allegations are expanded upon in a monumental "brief" totaling 180 pages, accompanied by 150 exhibits, and arranges the multiple allegations into **twenty-one separate legal issues**.

This Court notes that, although none of these multiple allegations has substantive merit, it is unnecessary to dwell on their lack of merit because all of them are procedurally barred from consideration by at least two and sometimes three separate provisions of Louisiana's Code of Criminal Procedure. These procedural barriers, affecting every single issue raised by petitioners in their current application for post conviction relief, will be discussed below.

Under the terms of Article 930.8 A of the Louisiana Code of Criminal Procedure, as amended by Act No. 1262, 1999, petitioners are required to have filed this application for post conviction relief within three years after their judgments of conviction and sentence became final. The only pertinent exception to this statutory limitation is set out in subparagraph (1) of that Article, which provides that the limitation does not apply if

(1) The application alleges, **and the petitioner proves or the state admits**, that the facts upon which

the claim is predicated were not known to the petitioner or his attorney." **(emphasis added).**

Petitioners' two previous applications for post conviction relief – in 1986 (Vol. I, p.108) and in 1990 (Vol.III, p.343) – having been initiated prior to the effective date of the current statute, were not affected by its limitations. However, the present application is barred by the limitation in Article 930.8 A, unless petitioners can meet the exception quoted above. In attempting to do this, petitioners have alleged that the facts upon which their latest claim is predicated were not known to them or their attorneys until fairly recently (Pet. Brief, p.18). The State, however, does **not** admit that the many attorneys who have represented Alexander and Granger during the past twenty-three years lacked knowledge sufficient to have raised these claims in previous proceedings. Accordingly, the statute requires petitioners **to prove** that neither they nor their counsel knew the predicate facts until just prior to the present application. Petitioners have failed to meet this requirement.

The second procedural barrier to this latest application for post conviction relief is found in Article 930.4 D and E of the Louisiana Code of Criminal Procedure, which provide:

* * *

"D. A successive application may be dismissed if it fails to raise a new or different claim.

E. A successive application may be dismissed if it raises a new or different claim that was inexcusably omitted from a prior application."

* * *

The current application is, of course, "successive" and raises a multitude of claims. Although all of petitioners' claims are barred under Article 930.8 as has already been pointed out, some of their claims are also barred under Article 930.4 D and others under Article 930.4 E.

Petitioners herein apparently recognize that their only hope of avoiding the limitations outlined above is to claim that the "the interests of justice" demand that these procedural barriers should not apply to them. This court finds that the so-called "interests of justice" exception is not applicable to a case such as this, where petitioners have aggressively and repeatedly over the years been asserting their claims through retained counsel in both state and federal courts. In rejecting petitioners' application for federal habeas corpus in 1993, the United States District Court stated:

> " . . . this court's refusal to consider the claims will not result in a 'fundamental miscarriage of justice . . . '" (Vol. IV, p.113),

a conclusion which, in view of the unchanged factual situation, should dispose of petitioners' claim in this regard.

There is no place in this case for an exception to the procedural limitations of the cited articles. These limitations were enacted by our state legislature for the specific purpose of putting an end to such "repetitive applications, unnecessary hearings, and administrative difficulties," as have become the hallmark of this case. *State ex rel Glover v. State*, 660 So.2d 1184 (La. 1993)

Article 930.2, Code of Criminal Procedure, places the burden of proof in these proceedings upon petitioners.

They have failed to meet the statutory burden throughout this latest application for post conviction relief.

Petitioners' multiple claims are set out in the legal brief accompanying their application for post conviction relief. Each of these claims has been answered in the brief provided to the Court by the State, in the same order as presented by petitioners, and will be adopted by this Court as its "Reasons for Judgment."

Article 929 A, Code of Criminal Procedure, provides:

> "A. If the court determines that the factual and legal issues can be resolved upon the application and answer, and supporting documents, including relevant transcripts, depositions, and other reliable documents submitted by either party or available to court, the court may grant or deny relief without further proceeding."

This Court finds that summary disposition of petitioners' application as provided by Article 929, *supra*, is appropriate. The convictions have been final for twenty-three years, many of the original participants in the investigation and trial are deceased or otherwise unavailable, memories have faded, and the claims must, in any event, be decided on the record.

Upon careful examination of the application, the answer and their supporting documentation, the Court concludes that petitioners have been unable to prove that they fall within the single exception to the limitations of Article 930.8A. They have not proved that all of their many previous legal counsel were ignorant of the factual bases for their current multiple claims. Accordingly, their application is DENIED because of procedural default.

All twenty-one of petitioners' current issues are barred by the limitations of Article 930.8A. additional limitations set out in Article 930.4D apply to Issues 2, 5, 6, 11, 15, 20, and 21, all of which fail to raise new or different claims. Issues 1, 3, 4, 7, 8, 9, 10, 12, 13, 14, 16, 17, 18, 19, and 20 are new claims additionally barred by the terms of Article 930.4E. (NOTE: Issue 19 is also barred by Article 930.4B, and Issue 20 is barred by three statutory limitations because of the multiple claims therein.)

The "Statement of Facts" in petitioners' brief (pp. 1-18) is largely an argument for their theory of the case, replete with inaccuracies and misleading statements. It may serve, however, to introduce the reader to the many complications affecting this case. References to pages in the trial court's record will appear as "(R___)." References to any of the four bound volumes of material will appear as "Vol___, p.___)."

The state's evidence at trial showed that on the night of March 29, 1976, David Alexander and Harry Granger, armed with revolvers, discussed robbing a small store near New Iberia (R. 1416-1420, 1456-1458). accompanied by four other youths in two cars, they drove out to the Hasty Mart, operated by Louis Gladu, to reconnoiter (R.1458-1460).

The following afternoon, at about three o'clock (R.1382-1387, 1401-1406), the two defendants, accompanied by the same group from the preceding evening, with the addition of Mary Arceneaux, drove in two automobiles to the Hasty Mart (R.1421-1426). Mary Arceneaux remained in Alexander's car (R.1427), but the others entered the store where they found Mr. Gladu alone (R.1466-1467). The defendant Alexander engaged Mr. Gladu in conversation while the other youths dispersed throughout the

store. Suddenly, Alexander pulled a pistol from his belt and fired twice at Mr. Gladu (R.1468-1470). Both shots were witnessed by Herbert Derouen, a member of the group, who testified for the State under a grant of immunity (R.1454-1477). When the shooting started, Derouen panicked and ran outside where he was pursued by another member of the group and forced into the car nearest the store (R. 1469-1471).

The gang then fled in the two automobiles. Alexander and Granger rejoined Mary Arceneaux who was waiting in Alexander's car across the road. A fourth passenger, John Nelson Collins, was left behind by Alexander when Collins inexplicably failed to return to the car (R.1431-1432), although he later rejoined the group in a neighboring town (R.1436, 1475-1476).

Mr. Gladu's body was discovered by a customer within minutes of the shooting. Investigators discovered that the Hasty Mart's cash register had been rifled (R.359-360, 1348, 1409-1410; Pros. Exs. S-4, S-5).

Approximately one week later, Mary Arceneaux, who "could live with the robbery, but not the murder," went, through a lay intermediary, to the authorities with her story (R.1428-1429), and eventually testified for the state under a grant of immunity.

A prosecution attempt to connect the robbery weapon with the defendant Alexander came to naught when State's witness Preston Demouchet became recalcitrant and testified that he knew nothing of the weapon (R.1518). After being declared a hostile witness, Demouchet asserted that he had been coerced into his initial cooperation with the investigators (R.1520-1524). Another State's witness, Gerry Paul Francis, called for the same purpose,

refused to testify on the grounds of self-incrimination (R.1528-1531). Both Demouchet and Francis were awaiting trial for a series of armed robberies (R.1517, 1528).

The defense produced one Malcolm Roy, who testified that Demouchet and Francis were the true perpetrators of the Hasty Mart crime, and that he had been their driver (R.1566-1581). He admitted having made prior inconsistent statements in this regard, but insisted that his trial testimony was correct (R.1581-1635). In rebuttal, the State produced evidence that Roy's version of events was physically impossible of accomplishment (R.1694-1696). (NOTE: Roy was later charged with perjury as a result of that testimony; he pleaded guilty and was sentenced to prison (Vol. I, p. 241; Vol. III, p. 483).

The defense offered one alibi witness, who testified that she had been a passenger in the defendant Alexander's taxi on the afternoon of the crime (R.1540-1542). Cross-examination, however, cast serious doubt upon the accuracy of her recollection of this incident (R.1545-1557), and the jury obviously did not believe her testimony.

Defendant Granger chose not to testify. Defendant Alexander testified that he did not know Mary Arceneaux and that he had never been to the Hasty Mart. He denied ever admitting that he had shot Mr. Gladu (R.1650-1673).

Andrus Wilson, a former prison-mate of Alexanders', was called by the State to rebut Alexander's denials. After being sworn, Wilson refused to testify (R.1685, 1689).

Petitioners argue in their "Legal Discussion" that there are no procedural bars to judicial consideration of this, their third, application for post conviction relief. They declare that the limitations of Article 930.8A, and Article

930.4, of Louisiana Code of Criminal Procedure, do not apply to this application because their "newly discovered evidence" was either suppressed by the State or "unknowable" to them without the substantial resources that were eventually provided by Centurion Ministries, Inc. They also argue that, even if the cited limitations were applicable, the Court should consider their claims "in the interest of justice," citing *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 251 (1995).

Petitioners' assertion that they have been without "substantial resources" until Centurion Ministries came to their aid is belied by the record and may be disposed of rather quickly. Rarely has a criminal case received the legal and investigatory assistance that has been provided to petitioners over the years.

As is pointed out in the State's answer, petitioners have not met the statutory burden of proof required to avoid the limitations of Article 930.8A. Although they have alleged that the facts upon which their latest claims are predicated were not known to them or their attorneys until recently, they have not proved those allegations. The State does not concede that every one of petitioners' many lawyers over the years lacked such knowledge, in fact, the evidence of record establishes that previous counsel did have all the information they needed to have raised these latest issues during the previous applications for post conviction relief.

Although petitioners assert that they and their several counsel over the years were previously unaware of the basis for their latest claims, these assertions are certainly unproven and are clearly unpersuasive, particularly considering that fate has placed an insurmountable

barrier in petitioners' path to judicial consideration of their allegations. Attorney H. Alva Brumfield, III, who, with Timothy Screen, represented petitioners in 1986, is now deceased. His passing was noted in petitioners' April 15, 1991 application for habeas corpus in the United States District Court for the Western District of Louisiana (Vol.IV, p.11), and mentioned repeatedly in petitioners' latest legal brief. Mr. Brumfield's death leaves petitioners with no feasible way of proving that he lacked knowledge of any particular matter. Not only is it impossible for petitioners to prove this negative, the available record affirmatively shows that Mr. Brumfield must have had knowledge of "the facts upon which the claim was predated."

The first evidence of Mr. Brumfield's knowledge of all pertinent matters in the case is found affixed to his 1986 application for post conviction relief. It is a statement entitled "Verification," dated February 3, 1986, and signed by both of petitioners' counsel, declaring that each is "familiar with the facts and records of this case "(Vol.I, p.311).

Implicit in this declaration is an assurance that both Mr. Brumfield and Mr. Screen (hereinafter referred to as "1986 counsel"), retained by petitioners, had interviewed witnesses and had reviewed the trial and appellate records, the records of trial defense counsel, the report of private investigator Lauland, and such of the State's records as were available to them. Equally implicit is the understanding that the 1986 counsel had selected as the predicates for their application only those aspects of the case that they felt merited judicial consideration.

Mr. Brumfield was uniquely situated to become "familiar with the facts and records of this case." At the same time that he was representing the petitioners in their 1986 efforts at post conviction relief, he was also representing Herbert Derouen, who had been the State's main witness at the 1976 trial – as well as four other original Hasty Mart defendants, all hoping to obtain monetary compensation from the State for the unpleasant consequences to them of the 1976 criminal proceedings (Vol.I, p.270). Rene Jackson, the sixth original defendant, was not included as one of Mr. Brumfield's civil clients.

If this were not enough, Mr. Brumfield was also representing original defendants Herbert Derouen, John Nelson Collins, and Ronald Miller, as well as Ronald Lauland (the private investigator), all of whom were being sued in a civil defamation action brought by the former sheriff and his deputies who had been publicly accused of framing the Hasty Mart defendants (Vol.IV, pp.184-187). It thus appears that Mr. Brumfield had become immersed in the intricacies of this convoluted case and that, even before filing for post conviction relief in 1986, he had taken the State's key trial witness – Herbert Derouen – two other original Hasty Mart arrestees, and the Alexander family's private investigator as his own clients. On top of all this, Mr. Brumfield was working hand-in-glove with the new sheriff, who was providing additional investigative resources and full access to the sheriff's own records on the case.

In the light of this complex set of circumstances, it is reasonable to conclude that Herbert Derouen, having switched camps, was cooperating fully with his new lawyer, Mr. Brumfield, and was disclosing everything that he knew about the prosecution's case, including the

substance and circumstances of his own pre-trial interviews. This recruitment of Herbert Derouen, and the other persons previously mentioned, to the scheme to seek damages from the State at the same time that post conviction relief was being sought for petitioners, confirms the validity of Mr. Brumfield's "Verification" that he knew everything he needed to know about the case.

It is worth noting here that, even prior to petitioners' trial in September 1976, the several defense counsel for the multiple Hasty Mart defendants had reasonable access to Herbert Derouen and to the other prosecution witnesses being held in the Iberia Parish jail. This is evidenced by the transcript of a pre-trial hearing on August 4, 1976, wherein the assistant district attorney declared in open court that defense counsel were free to interview the State's witnesses, and he was assured by defense counsel that there had been no problem with access to the jailed witnesses. That pre-trial hearing proceeded, and the lawyer for defendant John Nelson Collins actually called the State's key witness, Herbert Derouen, to testify for the defense on the issue of alleged improper identification of the defendants prior to their arrests. In so doing, the defense lawyer first reminded Herbert Derouen of a prior interview that Derouen, accompanied by his own legal counsel, had already given to him (defendant Collins's lawyer) and to Mr. Rubin (defendant Miller's lawyer). Thus, the record clearly reflects that all of the Hasty Mart defense counsel had every opportunity to interview Herbert Derouen and the other State's witnesses well prior to their appearances at the Alexander-Granger trial (Vol.IV, pp.188-194).

Of course, after Herbert Derouen joined the defense entourage in anticipation of monetary compensation, he

was then completely available to Mr. Brumfield and his colleagues as a source of information about anything that had occurred during his role as the State's key trial witness. Every conceivable issue that could plausibly involve Herbert Derouen must have been explored in detail by 1986 counsel. Any issue involving Herbert Derouen that was not raised during the 1986 proceedings for post conviction relief must surely have been rejected for tactical reasons – not for lack of information.

Mary Arceneaux likewise was amenable to interviews by the Alexander-Granger team. For instance, on August 23, 1985, private investigator Lauland conducted a video-taped interview of Mary Arceneaux in prison concerning the Hasty Mart case (Vol.IV, p.151-4 *et seq.*), and she cooperated fully. In January 1986, she gave Mr. Brumfield an affidavit in which she recanted her trial testimony (Vol.I, p.320), and, on April 23, 1986, she gave a deposition in the civil defamation suit. A copy of that deposition was attached to Judge Johnson's "Supplemental Reasons" for denying the 1986 application for post conviction relief (Vol.I, p.85)

In addition to the turncoat Herbert Derouen and the imprisoned, but cooperative, Mary Arceneaux, the 1986 counsel had several other sources from which to ascertain whether the contents of any pre-trial statements by State's witnesses or any other aspect of the investigation warranted raising a *Brady* issue. The first source, the district attorney's file on the case, was fully available to 1986 counsel. Upon being informed by Mr. Brumfield that he and Mr. Screen would be representing Alexander and Granger in an application for post conviction relief, Bernard E. Boudreaux, Jr., district attorney for the 16th Judicial District, having succeeded Knowels M. Tucker,

district attorney at time of trial, invited Mr. Brumfield to examine his office's files. On January 13, 1986, Mr. Brumfield wrote to acknowledge receipt of that invitation (Vol.IV, p.195). That Mr. Brumfield was present in the Iberia Parish courthouse after accepting the district attorneys' invitation and prior to filing for post conviction relief is evidenced by dated documents from the Iberia Parish Clerk of Court's office that accompanied Mr. Brumfield's 1986 application for post conviction relief (Vol.I, p.330). These dated documents, as well as the "Verification" (Vol.I, p.311), which was signed only twenty-one days after Mr. Brumfield had accepted the district attorney's invitation, are evidence that Mr. Brumfield carried out his intention, expressed in his letter of January 13, 1986, to review the district attorney's files.

Another source from which 1986 counsel must have acquired all the information they needed about this case was the sheriff's investigative files. As the primary investigating agency in this case, the sheriff's office had its own files on everything done and said by investigators and witnesses.

It is quite apparent that Mr. Brumfield worked in close concert with the new sheriff and with investigator Ronald Lauland, who not only was serving the new sheriff as his deputy (Vol.IV, p.161), and the Alexander family as their private investigator (Vol.IV, p.185), but was at the same time employed as a private investigator by Mr. Brumfield (Vol.I, p.309).

Clearly, 1986 counsel must have had sufficient knowledge of the details of any aspect of the Hasty Mart investigation to have permitted raising any claim that they felt warranted judicial consideration.

Petitioners' inability to prove that 1986 counsel lacked knowledge is sufficient by itself to bar this third application for post conviction relief. Art. 930.8A(1), Code of Criminal Procedure.

There was also a second application for post conviction relief, filed in 1990. Petitioners' counsel for that application was P. Charles Calahan, of New Iberia (Vol.III, p.343). Mr. Calahan's opportunities to have acquired the same information as the 1986 counsel are set out in the discussion below and need not be repeated at this point. Although petitioners have obtained an affidavit from Mr. Calahan declaring his ignorance of a number of specific matters (Pet. Ex. 114), the State will show, when appropriate, that Mr. Calahan did indeed have knowledge of many facts. Suffice it to say here that petitioners have failed to prove that all three of their counsel in the two previous post conviction proceedings lacked the knowledge necessary to have raised any of the claims in their current application.

Finally, for whatever reason, petitioners have made absolutely no effort to show that their very first post-trial lawyers, Philip O'Neill, lacked knowledge of the material upon which they base this latest application for relief. Most of the foregoing discussion concerning information available to petitioners' 1986 and 1990 counsel is equally applicable to Mr. O'Neill. In 1983 he filed his Motion for a New Trial, which motion included an affidavit by Mr. Ronald Lauland in support of his allegations (Vol.IV, pp.1,3). Mr. Lauland, of course, was serving simultaneously as the Alexander family's private investigator, Sheriff Romero's deputy, and Mr. Brumfield's investigator-client. Mr. Lauland's affidavit attested to the truth of Mr. O'Neill's allegation that Demouchet, Francis, and Roy

were willing to exonerate petitioners by admitting that they themselves were the guilty parties (Vol.IV, p.1 *et seq*). Although it now appears that these allegations and the affidavit were little more than wishful thinking, it is clear that Mr. O'Neill was working in close concert with Mr. Lauland, and had the benefit of Mr. Lauland's investigative report, in addition to whatever information Mr. O'Neill may have gained through his own devices. This Court finds that petitioners have done nothing to prove that Mr. O'Neill did not possess the information which they now allege to be "newly discovered."

The particular issues selected by 1986 counsel to support their application for post conviction relief were calculated professional decisions, not interfered with in any manner by the State. To have been excusable, Mr. Brumfield's omission of any particular claim from his application in 1986 would have had to have been a consequence of some outside interference or action by the state. *Murray v. Carrier*, 477 U.S. 478 106 S.Ct. 2639, (1986); *Glover v. Cain*, 128 F.3d 900 (C.A.5, 1997). Not only was there no such interference by the State, there was positive cooperation in the form of the invitation to Mr. Brumfield to review the district attorneys' files (Vol.IV, p.195), and the expressed willingness of the prosecution to permit defense counsel to interview its witnesses even prior to the trial itself (Vol.IV, pp.189-191). Whatever Mr. Brumfield may have done or failed to do, there is simply no way to prove that he did not know any particular fact.

The second round of post conviction proceedings on behalf of Alexander and Granger was initiated on September 28, 1990, by their new counsel, P. Charles Calahan, of New Iberia, Louisiana (Vol.III, p.343). Although this 1990 petition does not include a "Verification" statement by

counsel similar to that in the 1986 petition, it is reasonable to presume that Mr. Calahan likewise made himself "familiar with the facts and records" of the case. This presumption is buttressed by language from Mr. Calahan's "Rebuttal of Respondent's Memorandum of Law" in the United States District Court in June 1991. At page 15 of that document, Mr. Calahan declared that petitioners' claim that other persons committed the crime for which petitioners had been convicted is ". . . well-documented from all the evidence. It is documented from statements within the record at trial, from the records of other proceedings, and from official records kept by various governmental offices" (Vol.IV, p.99-"O").

The presumption is further reinforced by Mr. Calahan's detailed references to the record of trial in his Memorandum of Law accompanying the 1990 application for post conviction relief (Vol.III, p.355-359), his references to the 1986 post conviction relief proceedings conducted by his predecessor counsel (Vol.III, p.375), and his use of documents from the 1985 civil defamation suit that involved most of the original participants in this case (Vol.III, pp.377, 380, 436, 507).

Many exhibits attached to Mr. Calahan's 1990 petition for post conviction relief had their origins in Mr. Brumfield's 1986 post conviction relief proceedings and in the 1985 civil defamation suit (Vol.III, p.377). In an affidavit filed with petitioners' current legal brief (Pet. Ex. 114), Mr. Calahan states that he assisted Mr. Brumfield on petitioners' case while still a law student. After admission to the bar, Mr. Calahan, in 1990, began representing petitioners on his own. He claims that he reviewed Mr. Brumfield's records, but, as a sole practitioner, was handicapped to some degree. His primary sources of information

were trial transcripts, public records, and "anticipated disclosures from the district attorney's office." However, he complains that the district attorney provided him with no information whatsoever (Pet Ex.114).

Mr. Calahan's affidavit then lists sixteen items of evidence, some of which "may have been known to Mr. Brumfield," but which were unknown to the affiant. Mr. Calahan concludes his affidavit by saying: "As a result of the Centurion Ministries investigation, affiant is now aware that all of the information was or had been in the investigative files of the District Attorney. That it was inaccessible to him during the time of his representation, and that none of it was provided to him" (Pet. Ex.114).

It should be noted here that Mr. Calahan has not alleged that he ever asked for and had been denied access to the district attorney's files, but only that the district attorney "provided no information whatsoever to affiant" (Pet. Ex.114).

In view of the invitation extended to Mr. Brumfield (which surely included his then-assistant, Mr. Calahan) by the district attorney, of which invitation Mr. Calahan must have been aware, it is surprising that Mr. Calahan is now complaining that he was not provided information that he did not bother to request for examination.

Thus, it is clear that Mr. Calahan had access to everything known to Mr. Brumfield, as well as access to the evidence used by all parties to the 1985 civil defamation suit. Certainly, all of the documents in the civil suit became part of the public record, immediately available to Mr. Calahan in the Clerk of Court's files. Also, Mr. Calahan could have gone directly to the files in the district

attorney's office and in the sheriff's office, as Mr. Brumfield had done.

If, in fact, Mr. Calahan did not bother to review the files in the district attorneys' office, his failure to have done so is inexcusable. If he chose to base his 1990 claims upon evidence from the Brumfield files and the civil suit, that is a tactical decision that may not now be second-guessed.

As each of petitioners' claims is discussed herein, the appropriate reason for dismissal will be identified. (NOTE: All references herein to *Brady* material are to the case of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 [1963]).
ISSUE 1 (Pet. Brief, p.25)

Petitioners claim that the State knowingly permitted Mary Arceneaux to perjure herself when, at the outset of her trial testimony, she testified that she had only one prior conviction – for forgery. Petitioners then allege that Arceneaux had, in fact, pleaded guilty in 1973 to twelve counts of misdemeanor check offenses. In addition, petitioners allege that, at the same time that she was pleading guilty to forgery in 1974 she had pleaded guilty to seven misdemeanor counts of issuing worthless checks (Pet. Brief, p.25).

PROCEDURAL BAR

This claim is procedurally barred by Article 930.8A, Code of Criminal Procedure, in that petitioners have failed to prove that every one of their six previous legal counsel was not aware of Mary Arceneaux's criminal past. Indeed, the evidence of record strongly suggests that all of the previous counsel did know about her entire criminal

background. Although the burden of proof here is on petitioners alone, Article 930.2, Code of Criminal Procedure, and the State has no such burden, some of that evidence of record is outlined here.

One of the exhibits to Mr. Brumfield's application for post conviction relief in 1986 was his "Verification" statement, asserting that he and Mr. Screen were "familiar with the facts and records of this case" (Vol.I, p.311). The records of the case would, of course, include those of Arceneaux's criminal past, which were easily available as public records.

Mary Arceneaux, like Herbert Derouen, switched camps and joined the Brumfield team in time to provide her recantation affidavit to Mr. Brumfield (Vol.I, p.320) in support of his 1986 application for post conviction relief. That affidavit was given to Mr. Brumfield and his colleague, Mr. Screen, while Arceneaux was in the women's prison at St. Gabriel. Surely, Messrs. Brumfield and Screen were aware of the prison record of the person they were visiting there. More importantly, Arceneaux gave her deposition in the civil defamation suit on April 23, 1986, in which she disclosed her full prison record (Vol.I, p.91). That deposition was part of the district judge's "Reasons for Judgment," and known to Mr. Brumfield before he applied to the Louisiana Supreme Court for writs (Vol.I, p.23).

Another exhibit to Mr. Brumfield's 1986 application was a transcript of an interview on September 11, 1976, between Ronald Millers' lawyer and one Russell Daniels, in which Daniels is recorded as telling the lawyer that Mary Arceneaux had a long criminal record and had been in the penitentiary on three occasions (Vol.I, p.327). This

was not a totally accurate statement at the time it was made, but the fact that Mr. Brumfield attached it to his application for post conviction relief evidences that he had been put on notice that there may have been a discrepancy in Mary Arceneaux's trial testimony about her criminal record. Most probably, Mr. Brumfield looked further into this possible issue and concluded that the variance in the testimony, (together with a plea of guilty to a felony and several misdemeanors at the same time) was immaterial and not worth including in his 1986 application, which, like the 1990 application, was relying upon Arceneaux's recantation of her trial testimony. Again, Mr. Brumfield's death prevents us from ever learning just what he knew at the time and the reasoning behind his decisions, so petitioners are unable to prove that he didn't know enough facts to have raised this claim in 1986.

Sheriff Romero, the newly-elected sheriff who had recommended Mr. Brumfield to represent petitioners in their 1986 application for post conviction relief, was cooperating fully with Mr. Brumfield and his team, and making available to them whatever information he possessed or was able to obtain (Vol.IV, pp.151-24 through 151-25). During the course of Sheriff Romero's investigation into the case, he, his chief of detectives, and private investigator Lauland interviewed Mary Arceneaux at the women's prison on more than one occasion (Vol.I, pp.31, 106-108). It is highly unlikely that, while Sheriff Romero and his colleagues were arranging with penitentiary officials to visit Mary Arceneaux, her entire criminal record was not before him and the Brumfield team.

At page 27 of their legal memorandum, petitioners express concern that the prosecutor accepted Mary Arceneaux's testimony that she was on "parole," and did not

disclose that she was also on probation for the misdemeanor checks. Pretermitting the fact that "parole" is significantly more serious than "probation," this information was clearly known to petitioners' camp well prior to the first of their applications for post conviction relief. Petitioners' Exhibit 70 is a copy of a letter to Sheriff Romero from William Lacombe, parole officer, dated August 27, 1985. That letter refers to Arceneaux's supervised probation. The collegial relationship existing among Sheriff Romero, Messrs. Brumfield and Calahan *et al*, and the allegations in petitioners' prior legal documents clearly establish that petitioners' camp was aware of Arceneaux's problem with probation well prior to their 1986 application. Also, in Mr. Lauland's report of investigation, provided to Mr. Brumfield in 1986 (Vol.I, p.309), Mr. Lauland refers to Mary Arceneaux as having "a record of bad check writing" and as being "out on probation at the time "(Vol.IV, p.182 j). Obviously, Mr. Brumfield had full knowledge of Arceneaux's criminal record.

In any event, the State does not have to prove that previous counsel knew of these matters. Article 930.8A(1) places the burden upon the petitioners to prove that their counsel were never aware of them. This Court finds that petitioners have failed to meet this burden of proof, and, therefore, this claim is procedurally barred.

In addition to the procedural bar created by Article 930.8A, petitioners are barred by the terms of Article 930.4E in that Mr. Brumfield, in his 1986 application, inexcusably failed to raise this issue despite having been put on notice of the possible discrepancy by: 1) his own exhibit – the transcript of the Russell Daniels interview (Vol.I, p.322), 2) his visit to Arceneaux in prison on January 28, 1986 to obtain her affidavit of recantation (Vol.I,

p.320), and, 3) his private investigator's report concerning Arceneaux's criminal record (Vol.I, p.182-j).

Mr. Calahan, who was Mr. Brumfield's assistant during the 1986 proceedings (Pet. Ex. 114) and who had access to the pertinent records, likewise inexcusably failed to raise this claim in his 1990 application.

ISSUE 2 (Pet. Brief, p.29)

This claim appears to allege, in a most argumentative fashion, that the State paid Mary Arceneaux to testify as she did at petitioners' trial (Pet. Brief, p.29)

PROCEDURAL BAR

The argument in petitioners' brief alleging that Mary Arceneaux's testimony was purchased by the State provides little assistance to the Court in defining a specific legal issue here. It appears that that petitioners are claiming that Mary Arceneaux was paid by the State to testify as she did, and further allege that the State concealed this information from petitioners' counsel.

If this is indeed the issue here, it is barred by Article 930.4D as repetitive of a claim previously and unsuccessfully made in earlier applications. If it purports to raise a new issue, because of the "newly discovered evidence" of the Lacombe letter (Pet. Ex. 70), the three new affidavits (Pet. Exs. 123, 124, 130), and the Dumaine (Domingue) interview (Pet. Ex. 73), it is barred under the provisions of Article 930.8A because petitioners have failed to prove that none of their previous counsel had such information at the time of the previous applications of post conviction relief.

In their 1986 application for post conviction relief, petitioners raised much the same issue, phrasing it more succinctly as ". . . the State knowingly used perjured testimony. Said testimony was encouraged by the striking, paying and prompting of the witnesses Mary Arceneaux and Herbert Derouen . . ." (Vol.I, p.309). To support this allegation, petitioners introduced five affidavits (Vol.I, pp.316, 317, 319, 320, 321). The last of these affidavits included a statement by one Russell Daniels to the effect that Mary Arceneaux had once confided in him that the State had promised her lavish compensation for her assistance in the Hasty Mart case (Vol.I, pp. 323-324). The State refuted this claim in its response (Vol.I, pp.222-230), and the state district court considered and rejected the attacks on Mary Arceneaux's trial testimony (Vol.I, pp. 70-73). In applying to the Louisiana Supreme Court for supervisory writs in 1986, petitioners again argued that Mary Arceneaux had been paid for her trial testimony (Vol.I, p.32). Without comment, the Louisiana Supreme Court denied writs (Vol.I, p.1).

This claim by 1986 counsel was abandoned by Mr. Calahan in 1990 in the state court (Vol.III. p.343), although, in his application for federal habeas corpus, he did allege without elaboration that Mary Arceneaux had been "bribed" (Vol.IV, p.43). Without commenting on the bribery allegation, the United States District Court held that there had been no perjury by either Arceneaux or Derouen (Vol.IV, pp. 121-123). The Court of Appeals for the Fifth Circuit, upon reviewing the case, held that the factual findings by the state court, and the federal district court's subsequent ruling " . . . defeat both the claim that (petitioners) were convicted based upon false testimony and the

claim that the prosecution knowingly used false testimony" (Vol.IV, p.143).

Petitioners, by suggesting that this is " . . . part novel, part repetitive issue" (Pet. Brief, p.29), obviously recognize that this is really a repetitive claim that should be dismissed under Article 930.4 D. In seeking to avoid this fate, they add a few embellishments, such as new affidavits, the contents of which, petitioners argue, are intended to show that Mary Arceneaux was paid for her testimony (Pet. Brief, p. 34).

These three affidavits are something less than bombshells of evidence. Debra Vilcan never witnessed any payments, but "observed" that Arceneaux "had money" after visits by Detective Moore (Pet. Brief, p.34). Detective Moore's ex-wife declares that Moore told her of giving money to Arceneaux (Pet. Brief, p. 34). Norma Pradia, with phenomenal recall, reports being told by Arceneaux twenty-three years ago that she had been paid $800 by Moore and Captain Comeaux for saying that she was with some guys who committed a murder (Pet. Brief, p.34).

This last affidavit, by Pradia (Pet. Ex. 124), is refuted by Captain Comeaux (Vol.IV, p.200). The other two affidavits do nothing to support petitioners' allegations, and the insinuations are directly refuted by Mary Arceneaux's deposition on April 23, 1986 in the civil defamation suit. This deposition was given by Arceneaux long after she had become a star witness for the Sheriff Romero-Brumfield team and had no reason to cover for Captain Comeaux and the deputies. In that deposition, Mary Arceneaux stated: "Horace (Comeaux) ain't never give me no money" (Vol.II, p.249), and that no one gave her money "to lie on Alexander" (Vol.II, pp.248-249).

Even if these three new affidavits were actually of some significance, this 1986 issue cannot be revived in 1999. The law is clear that petitioners may not reassert an earlier claim for the sole reason that they have thought of new arguments in support of their rejected claim. *Passman v. Blackburn*, 797 F.2d 1335 (5th Cir. 1986); *Johnson v. McCotter*, 803 F.2d 830 (5th Cir. 1986).

The references to William Lacombe, the probation officer, and the insinuations behind those references (Pet. brief, pp.30-31) introduce nothing new to petitioners' post-trial efforts for relief. The Lacombe letter is dated August 27, 1985, and is directed to Sheriff Romero (Pet. Ex. 70), who was actively conducting his own investigation on behalf of petitioners well before Mr. Brumfield filed the 1986 application. Sheriff Romero and the Brumfield group worked together in preparing Mr. Brumfield's case, and Sheriff Romero shared the results of his investigations with Mr. Brumfield and with Mr. Lauland, the Alexander family's private investigator (Vol.IV, p.151-25). Clearly, Mr. Brumfield had full knowledge of the Lacombe letter prior to the 1986 filing. Mr. Calahan, then assisting Mr. Brumfield (Pet. Ex. 114), had to have had the same knowledge, yet neither the 1986 nor the 1990 applications contained any mention of Lacombe's letter. Petitioners are barred from gleaning discarded items of possible evidence from earlier proceedings and then attempting to rehabilitate those items into viable issues at a later date.

The interview that private investigator Lauland had with Mrs. Bernice Dumaine (Domingue) occurred on April 20, 1983 (Vol.IV, pp.182 d- 182 g) and the transcript (Pet. Ex. 73) was part of Lauland's report to his employers – the Alexander family and Mr. Brumfield (Vol.IV, p.182 d-g). In his 1986 application for post conviction relief, Mr.

Brumfield mentions receiving Mr. Lauland's final report just prior to filing (Vol.I, p.309).

Actually, Bernice Domingue had been interviewed on petitioners' behalf even before she met Mr. Lauland. On July 23, 1981, she was interviewed by Deputy Don Durall (Vol.IV, p.156 B), who had been instructed to do so by Sheriff Romero (Vol.IV, p.154). Durall's report of that interview was Exhibit 1 to the affidavits of both Sheriff Romero and his chief of detectives Davis in the civil defamation suit (Vol.IV, pp. 154, 158), both of whom shared their investigative results with Mr. Brumfield (Vol.IV, pp. 151-24, 151-25). Mr. Lauland's report of his 1983 interview of Mrs. Domingue was Exhibit 2 to those same affidavits by Sheriff Romero and Chief Davis (Vol.IV, pp.154, 158). Thus, the record establishes that the Bernice Domingue interview is not "newly discovered evidence."

Issue 2 is barred from judicial consideration by both Article 930.8 A and Article 930.4 D.

ISSUE 3 (Pet. Brief, p.36)

Petitioners claim that a *Brady* violation occurred when the State failed to disclose to trial defense counsel the contents of two documents: 1) the transcript of an April 5, 1976, statement by Mary Arceneaux, and 2) the report of her April 13, 1976, polygraph test, both of which, petitioners allege, contain statements inconsistent with her trial testimony.

PROCEDURAL BAR

Article 930.8 A, Code of Criminal Procedure, bars petitioners from raising this issue in their third application for post conviction relief. As in all of these long-delayed allegations, petitioners have failed to prove that

all of their previous counsel lacked knowledge of the facts necessary to have raised this claim in an earlier proceeding.

The State has no burden of proof here, Article 930.2, Code of Criminal Procedure, but notes that the record itself establishes that petitioners' previous counsel had knowledge of the facts necessary to have raised this claim under Issue 3 had they chosen to do so. The transcript of the April 5, 1976, statement by Mary Arceneaux was part of the applications for post conviction relief in both 1986 and 1990 (Vol.III, pp.377, 403). In fact, petitioners concede in their current brief that: "petitioners attached the April 5th statement to their 1986 application for a writ of review and again to their 1990 post conviction application . . ." (Pet. Brief, p.37).

As to the polygraph report, petitioners mistakenly assert that "the April 13th polygraph report appears to have been unknown to post conviction counsel" (Pet. Brief, p.37). Petitioners are in error here. The report of Mary Arceneaux's polygraph test was mentioned by Mr. Brumfield in his 1986 application for writs (Vol.I, p.47) and was Exhibit No. 26 to Respondent's Answer to that application (Vol.I, pp.249, 292). Thus, it is clear that the polygraph test in question was known to Mr. Brumfield and his associates, including his then-assistant, Mr. Calahan (Pet. Ex. 114), who later represented petitioners himself in their 1990 proceedings.

Petitioners have submitted an affidavit by Mr. Calahan (Pet. Ex. 114) in which he states that he was unaware of the report of the April 13, 1976, polygraph test; but, as demonstrated above, the record reflects that he, and all

members of the Brumfield team, had that report as early as the 1986 application for post conviction relief.

Most of petitioners' discussion of Issue 3 is devoted to argument concerning Mary Arceneaux's lack of credibility, a matter which has been explored exhaustively in every proceeding since 1976. The immediate issue before the Court at this time, however, is simply a procedural one; *viz.*, are petitioners barred from even raising this *Brady* issue at this late date? The terms of both Article 930.8 A and 930.4 E preclude judicial consideration of this issue.

Petitioners appear to recognize that they are barred from raising this and their other issues in this third application for relief, and, citing *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851 (1995), repeatedly declare that to find procedural default here would be a miscarriage of justice. The jurisprudence has indeed provided an exception to the procedural default rules in certain extraordinary cases; but this is not such a case. The Court will fully discuss the applicability of the rule of *Schlup v. Delo* to this case later on in its "Reasons for Judgment."

ISSUE 4 (Pet. Brief, p.44)

Petitioners claim another *Brady* violation occurred when the State failed to disclose several allegedly inconsistent pre-trial statements by Mary Arceneaux concerning possible disposition of the murder weapon.

PROCEDURAL BAR

As in all of petitioners' other claims, this Issue 4 is barred from judicial consideration by Article 930.8 A, Code of Criminal Procedure. Petitioners have failed to prove that every one of their many legal counsel over the years

did not know of the facts upon which this claim is predicated.

Not only have petitioners failed to meet their burden of proof in this regard, the evidence of record establishes that the several counsel **must** have known those facts.

Although the State has no burden of proof here, Article 930.2, Code of Criminal Procedure, the Court notes that there are several specific portions of the record proving that petitioners' previous counsel knew of the pretrial statements that give rise to this issue. The fruitless search for the murder weapon at Cypress Island was raised in Detective Woodring's letter of September 11, 1987, to Sheriff Romero, whose role as an active member of the Brumfield team has been previously discussed. That letter became petitioners' Exhibit 3 in their 1990 application for post conviction relief (Vol.III, pp.377, 380).

Herbert Derouen's trial testimony that he had seen the murder weapon in Alexander's possession in St. Martinville apparently conflicted with Mary Arceneaux's initial statement that she thought Alexander and Granger had buried the weapons on Cypress Island. This apparent conflict was noted in Mr. Lauland's report of investigation (Vol.IV, pp. 182 k, o, r), which Mr. Brumfield used as a primary source of information (Vol.I, p.309). Clearly Mr. Brumfield had enough knowledge of the possible Cypress Island issue had he thought that it merited judicial consideration.

Captain Comeaux's report of 4/12/76 (Pet. Ex. 29, pp.1, 2, 4) refers to Mary Arceneaux's initial statements concerning the trip to Cypress Island. This report by Captain Comeaux has been part of the sheriff's and district attorney's files since 1976, and available to all of

petitioners' previous counsel in the 1983, 1986, and 1990 post conviction proceedings. That Mr. Brumfield actually possessed the Comeaux report of 4/12/76 is established by his introduction of an exhibit, which he labeled as "Comeaux 1" during his examination of Captain Comeaux at the latter's deposition on May 7, 1987, in the civil defamation suit (Iberia No. 59 400). Captain Comeaux's report of 4/12/76 is part of Mr. Brumfield's own exhibit "Comeaux 1" (Vol.III, pp. 508 A-508 B).

Later, in 1990, Mr. Calahan applied again for post conviction relief and included, as his Exhibit No. 17, a copy of Captain Comeaux's deposition of May 7, 1987, which included the report in question, *viz.*, "Comeaux 1" (Vol.III, pp. 377, 506, 508 A).

It is obvious from the record that petitioners' previous post conviction counsel were not particularly interested in the possibility of inconsistent pre-trial statements, but were relying instead upon the affidavits of recantation that they had obtained from Herbert Derouen and Mary Arceneaux. These were tactical decisions made by retained legal counsel, and they may not be second-guessed in this successive application for relief.

The allegedly inconsistent statements by Mary Arceneaux concerning Emily Wiltz, Raymond Sam, and Russell Daniels were the subject of defense inquiry even before the 1976 trial. Petitioners' Exhibit No. 41 is a copy of a transcript of an interview by Richard Broussard with Russell Daniels on August 27, 1976. Mr. Broussard was defense counsel for Hasty Mart defendant John Nelson Collins, and his questioning covers the Wiltz and Sam persons (Pet. Ex. 41). A similar statement by Russell

Daniels appeared as an exhibit to petitioners' 1986 application for post conviction relief (Vol.I, pp. 322-327).

Andrus Wilson's pre-trial statement concerning Alexander's disposal of the weapon really has nothing to do with the issue of prior inconsistent statements by Arceneaux. Nevertheless, the record indicates that the contents of Wilson's statement were known to petitioners' counsel from the time of the State's answer to the 1986 application, where it was attached as an exhibit to that Answer (Vol.I, p.285).

The bulk of petitioners' discussion of this issue is simply unsubstantiated argument on the substantive merits of the issue. This Court finds that this issue is clearly barred from judicial consideration by Articles 930.8 A and 930.4 E.

ISSUE 5 (Pet. Brief, p.49):

The so-called "tail-pipe issue" was featured in the 1990 post conviction proceedings and was thoroughly rejected by all courts, most emphatically by the United States District Court (Vol.IV, pp.109-112). There is no basis here for a successive post conviction application. It is barred not only by Article 930.8 A but also by Article 930.4 D as failing to raise a new or different claim, a fact apparently recognized by petitioners who now describe it as a "non-issue" (Pet. Brief, p.49).

ISSUE 6 (Pet. Brief, p.50)

This is a general claim that Mary Arceneaux's identifications of the Hasty Mart participants were faulty and that her early misidentification of one Daniel Tharpe was kept from defense counsel.

PROCEDURAL BAR

As in petitioners' other claims, this Issue 6 is barred from judicial consideration by Article 930.8 A, Code of Criminal Procedure. Petitioners have failed to prove that every one of their many legal counsel over the years did not know of the facts upon which this claim is predicated.

Not only have petitioners failed to meet this burden of proof, the evidence of record establishes that their several post conviction counsel must have known of the predicate facts of this issue.

Petitioners have conceded that this claim is "part novel, part repetitive" (Pet. Brief, p.50), The "repetitive" portion of this issue apparently is concerned with a general allegation of misidentification of the Hasty Mart defendants by Mary Arceneaux. This issue was raised by Mr. Calahan in his 1990 application for post conviction relief (Vol.III, pp. 363-365). The state district court ruled that, having inexcusably failed to raise the issue at trial or on appeal, petitioners were barred from judicial consideration of this claim (Vol.II, p. 4, 63). The Louisiana Supreme Court denied writs (Vol.II, p.1).

Ruling upon the application for a writ of habeas corpus in 1991, the United States District Court upheld the state court's finding of procedural default, and held further that its ruling would not result in "a fundamental miscarriage of justice." (Vol.IV, p.113).

The "novel" portion of this issue appears to be the alleged misidentification of Daniel Tharpe as a possible participant in the crime. Petitioners claim that this information was unknown to their camp until an investigator from Centurion Ministries "uncovered" it recently (Pet. Brief, p.53).

The evidence "uncovered" by Centurion Ministries is a copy of a warrant for the arrest of Daniel Mitchell Tharpe, signed on April 6, 1976, by Judge Robert Johnson (Pet. Ex.128). The warrant charges Tharpe with the Gladu murder and armed robbery. Petitioners have also obtained an affidavit from Tharpe describing how he was arrested, held for a few hours, then released when his alibi was confirmed (Pet. Ex. 128 A).

Petitioners' brief fails to mention where this document was reposing when Centurion Ministries "uncovered" it. Since it was a copy of an arrest warrant, it had to have been a part of the sheriff's files and, as such, under the possession and control of Sheriff Romero, whose active cooperation with all previous counsel for petitioners has already been documented. In a deposition in the civil defamation suit, Sheriff Romero admitted sharing his information in the case with Mr. Brumfield and the private investigator, Mr. Lauland, although he did not extend that same cooperation to the district attorney (Vol.IV, pp.151-25, 151-36). Mr. Calahan's affidavit concedes that, although he himself was not aware of the Dan Tharpe arrest, ". . . some of the evidence may have been known to Mr. Brumfield . . ." who had ". . . accumulated an investigative file . . ." (Pet. Ex. 114, paras.2, 4j).

That Mr. Brumfield's "investigative file" included information as to the involvement of Dan Tharpe as a possible suspect in the initial stages of the Hasty Mart investigation is easily established. As noted many times, *supra*, Mr. Lauland was serving simultaneously as investigator for the Alexander family, for Brumfield, and for Sheriff Romero. Mr. Brumfield's initial application for post conviction relief in 1986 acknowledged receipt of Mr. Lauland's report just prior to filing his application (Vol.I,

p.309). In Mr. Lauland's report, copies of which Mr. Lauland also gave to Sheriff Romero and to the district attorney (Vol.IV, p.183 k), Mr. Lauland included a verbatim transcript of a taped report by O'Neill Tyler, investigator for the district attorney (Vol.IV, pp. 182 g, 183 a, *et seq*).

Investigator Tyler relates in that transcript how one Dan Mitchell, 531 Elizabeth Street, New Iberia, had come in voluntarily on April 6, 1976 after learning that he was wanted for questioning. Because of the late hour, Mr. Tyler put off detailed questioning of Mitchell until the next day. He did note, however, that Mitchell had offered an alibi that he had been fishing and that this could be verified by the bridge tender (Vol.IV, p.183 e).

That this Dan Mitchell is the same person as the Dan Mitchell Tharpe named in the arrest warrant (Pet. Ex. 128 B) is established by the address: "531 Elizabeth Street," and the bridge tender alibi (Pet. Ex. 128).

Thus, it is clear that Mr. Brumfield and his colleagues knew about Dan Mitchell Tharpe's possible involvement prior to filing the 1986 application for post conviction relief. Having ignored this "novel" portion of Issue 6 in both the 1986 and 1990 applications for post conviction relief, petitioners are barred from raising it now.

Issue 6 is barred from judicial consideration by the terms of both Article 930.8 A and 930.4 D, Code of Criminal Procedure.

ISSUE 7 (Pet. Brief, p.58)

Petitioners claim here that Herbert Derouen's pretrial statements of April 6 and 13, 1976 were undisclosed *Brady* material inconsistent with his trial testimony.

PROCEDURAL BAR

Petitioners devote many pages (Pet. Brief, pp.54-63) to substantive argument on the alleged details of this claim. Although there are some misstatements of fact and faulty argument therein, this Court will address only the procedural aspects that bar judicial consideration.

As in petitioners' other claims, Issue 7 is barred from judicial consideration at this late date by the limitations of Article 930.8 A. Petitioners have failed to prove that all of their previous counsel were unaware of the facts upon which this Issue 7 is predicated.

Reference to the record will establish that previous counsel for petitioners did indeed have access to the facts pertinent to this issue. There are two pre-trial statements by Herbert Derouen upon which Issue 7 is based: 1) a statement to deputies on April 6, 1976, and. 2) a report by Captain Horace Comeaux, dated April 13, 1976, (Pet. Ex.80) relating Derouen's comments while passing the Candlelight Lounge.

The statement of April 6, 1976, was referred to in the State's Answer to the 1986 application for post conviction relief (Vol.I, p.232), and again in Exhibit No. 15 to that Answer (Vol.I, p.279). It was also the basis for questioning by Mr. Brumfield while taking a deposition from former deputy Lloyd Landry in the civil defamation suit (Vol.IV, p.210). The recording of Derouen's April 6, 1976, statement was played during those proceedings, and a transcript of that statement became part of the civil court record (Vol.IV, pp.211, *et seq.*).

As part of that same civil suit, Mr. Brumfield interrogated Captain Comeaux during the latter's deposition on

May 7, 1987. In the course of that deposition, Captain Comeaux related how Herbert Derouen, on April 6, 1976, had not only freely admitted to witnessing the crime (Vol.III, pp. 516 A-516 C), but shortly after making that statement had accompanied the detectives to the Hasty Mart where he demonstrated what had happened there (Vol.III, p.516 B). Mr. Calahan used the transcript of that deposition as his Exhibit No. 17 in his 1990 application (Vol.III, pp.377, 506 *et seq.*). Clearly, previous counsel knew about Derouen's statement of April 6, 1976, but chose to ignore it as being incompatible with the recantation they had obtained from him in 1986.

Captain Comeaux's report of April 13, 1976, (Pet. Ex. 80) was filed in the district attorney's office (and presumably in the sheriff's office also), where it was retrieved by petitioners' current counsel. It had been retrieved much earlier, however, by Mr. Brumfield, who had accepted the invitation to examine the district attorney's files. That Mr. Brumfield had possession of the report of April 13, 1976, is recorded in the civil defamation suit (Iberia No. 59400). While examining Captain Comeaux during the deposition on May 7, 1987, Mr. Brumfield introduced his own exhibit, "Comeaux 1," page 13 of which (Vol.III, p.508 A) is a copy of the very report which petitioners have now labeled as their "Pet. Ex. 80." As mentioned *supra*, Captain Comeaux's deposition of May 7, 1987 was Mr. Calahan's Exhibit No. 17 in 1990 (Vol.III, pp.377, 506 *et seq.*).

The Court notes from the record the availability to all of petitioners' many lawyers, to their private investigators, and to their ally – the new sheriff – of everything in the district attorney's files, including the Herbert Derouen statements of April 6 and 13. The use of those statements in the civil defamation suit, mentioned above, evidences

that Messrs. Brumfield and Calahan had access to those documents.

The Court finds that a likely explanation for previous counsel's lack of interest in pre-trial statements by Herbert Derouen lies in the fact that previous counsel were relying heavily on the recantations by Mary Arceneaux and Herbert Derouen, and probably saw no reason to allege prior inconsistent statements as a constitutional concern. These tactical decisions by petitioners' previous counsel may not now be revisited in this successive application.

It is petitioners' burden under Article 930.8 A(1), to prove that neither Mr. Brumfield, nor any of their other previous counsel, had knowledge of the two statements under examination. This they have failed to do, and their Issue 7 is barred from judicial consideration. It is also barred under Article 930.4 E as inexcusably omitted from previous applications.

ISSUE 8 (Pet. Brief, p. 63)

This claim is rather unsatisfactorily defined by petitioners in the following manner: "The April 19, 1976 interview (novel evidence, novel issue)." From the accompanying text in petitioners' brief (pp.63-82), it appears that this claim is predicated upon alleged differences between Herbert Derouen's statements on April 19, 1976, not disclosed to trial defense counsel, and other statements made by Derouen, including his trial testimony. This, then, is another *Brady* issue.

PROCEDURAL BAR

As is the case with all of petitioners' current claims, the procedural bar of Article 930.8 A, Code of Criminal

Procedure, precludes judicial consideration of Issue 8. When petitioners' laconic definition of this claim is viewed in the light of its accompanying text, it appears that Issue 8 is predicated on possible variances between Herbert Derouen's pre-trial statements and his trial testimony. Although petitioners devote nineteen pages of their brief (pp.63-82) to vitriolic and impassioned argument on the merits of this claim, these substantive arguments are premature until petitioners have cleared the procedural barrier erected by Article 930.8. A.

To avoid the limitations of Article 930.8 A, petitioners must prove that all of their many previous legal counsel were unaware of the facts upon which this claim is predicated, *viz.*, the allegedly inconsistent statements by Herbert Derouen on April 6, 13, and 19, 1976. This, they have not even attempted to do here – nor can they meet this burden.

As the State has pointed out repeatedly in its brief, Mr. Brumfield, who played such a major role in the 1986 application and in the civil defamation suit, is now deceased. It is impossible to prove that he did not know any particular aspect of this case, especially as to material that was reasonably available to him. With the exception of Mr. Calahan's affidavit (Pet. Ex. 114), petitioners have made no effort to prove that their several legal counsel over the years were unaware of the predicate facts underlying this issue. Mr. Calahan's affidavit acknowledges that Mr. Brumfield had accumulated an investigative file and that some of this evidence may have been known to Mr. Brumfield (Pet. Ex. 114, paras. 2, 4). This concession by Mr. Calahan, coupled with the total absence of any attempt to prove lack of knowledge by Mr. Brumfield and

the other previous counsel, is fatal to petitioners' claims here.

The "predicate facts" of this Issue 8 are the statements by Herbert Derouen on April 6, 13, and 19, 1976. Although the State has no burden of proof here, it has shown earlier, under the discussion of Issue 7, *supra*, how the record reflects that Derouen's statements of April 6 and 13, 1976 were known to petitioners' previous counsel.

Derouen's interview of April 19, 1976 was recorded in the presence of his own legal counsel, and the tape and transcript of that interview were examined in the district attorney's files by petitioners' present counsel and investigator. At counsel's request, several tapes, including that of the April 19 interview, were sent to her by the district attorney, and she had new transcripts made for her own use (Vol.IV, pp. 201-204). As part of the district attorney's files, that statement had been available to Mr. Philip O'Neill, who filed the motion for a new trial in 1983; to Messrs. Brumfield and Screen, who had the opportunity to examine those files; to Mr. Calahan in 1990, had he chosen to look into the district attorney's files; to Sheriff Romero and his deputies, who copied materials from those files; and Mr. Lauland, the private investigator, hired by both the Alexander family and Mr. Brumfield.

Mr. Brumfield's "Verification" in 1986 acknowledged his familiarity with "the facts and records of this case." He must have been especially familiar with any aspect of the case involving Herbert Derouen, who had switched sides, recanted his trial testimony, and become Mr. Brumfield's client in two civil matters involving the evidence in this case (Vol.II, p.192; Vol.IV, p.186). As stated earlier, any issue involving Herbert Derouen that was not raised by

Mr. Brumfield in 1986 must surely have been rejected for tactical reasons – not for lack of information.

Even before petitioners' trial and before he had switched over to Mr. Brumfield's team, the record shows that Herbert Derouen was available at all times for interview by any of the Hasty Mart defense counsel. In a pre-trial hearing on August 4, 1976, the prosecutor stated in open court that defense counsel were free to interview the State's witnesses (Vol.IV, p.189). Defense counsel for Hasty Mart defendant Collins then acknowledged that he had encountered no difficulties in speaking with the State's jailed witnesses (Vol.IV, p.190). The defense lawyer then called Herbert Derouen, the State's key trial witness, as a defense witness in the pre-trial hearing (Vol.IV, p.193). Prior to questioning Derouen, the defense lawyer reminded him of an earlier interview that Derouen, while in jail, had granted to him and to another Hasty Mart defense lawyer (Vol.IV, p.194). This open access to Herbert Derouen was long before Derouen switched camps and became Mr. Brumfield's client. Obviously, the State did nothing to keep Derouen, or any of the other State's witnesses, from being interviewed by defense lawyers.

The reason behind previous counsels' tactical decisions not to use *Brady* claims in the earlier applications is understandable. Until the filing of this latest application, the focus of petitioners' legal efforts had been on the recantations of trial testimony by Arceneaux and Derouen. Previous counsel apparently made calculated decisions that they would base their claims for relief upon the affidavits of the recanting witnesses. Any possible inconsistent statements were, at that time, immaterial, and perhaps even incompatible with their 1986 and 1990 theories of the case.

Whatever the reasons that led to counsels' prior decisions, those decisions may not be questioned in this third application for post conviction relief. This issue is barred by the limitations of Article 930.8 and Article 930.4 E.

ISSUE 9 (Pet. Brief, p.82)

This issue claims that constitutional (*Brady*) error occurred when the State failed to disclose to the defense three pre-trial statements by witness Paul Arcement that allegedly vary from his trial testimony (Pet. Brief, p.84).

PROCEDURAL BAR

Issue 9 is closely related to Issue 8 because, as petitioners state: "(t)he constitutional error that inheres in the nondisclosure of Arcement's pretrial statements could not have been apprehended without recourse to Derouen's April 19 statement, and is raised excusably, for the first time in this application. *See* La. C.Cr.P. Art.930.4." (Pet. Brief, p.84)

Petitioners acknowledge that Arcement's pretrial statements came to light as a result of Sheriff Romero's 1980's investigation on their behalf (Pet. Brief, p.84). They assert, however, that the significance of those statements did not become apparent until petitioners' current counsel acquired from the district attorney files the transcript and tape of Derouen's April 19, 1976, interview. That interview, petitioners allege, contains statements that are inconsistent with Arcement's pre-trial statements.

That argument presupposes that petitioners' current counsel was the first to learn of Herbert Derouen's interview of April 19, 1976. The State has shown, in discussing Issue 8, that petitioners have failed to prove that all of

their predecessor counsel lacked knowledge of that interview. All of the State's comments under Issue 8 are equally pertinent here, especially the part that reasons that Herbert Derouen's relationship with Mr. Brumfield, commencing in 1985, had become so close with reference to Hasty Mart matters (Vol.II, p.192; Vol.IV, p.186), that any claims not raised by Mr. Brumfield in 1986 must surely have been because of tactical reasons – not for lack of information. Mr. Brumfield had a true insider as a source of information – an insider with a pecuniary interest in providing Mr. Brumfield, his new lawyer, with everything he knew about the case – especially his own participation.

Petitioners have conceded that the Arcement statements (Pet. Exs. 25A, B, C) were in their possession back in the 1980's when Sheriff Romero was providing them with investigative assistance. Their allegation that Herbert Derouen's interview of April 19, 1976 was unknown to all prior legal counsel is just that – an allegation. Mr. Lauland's report, source of much of Mr. Brumfield's information (Vol.I, p.309), pointed out possible variances between the statements of Arcement and Derouen (Vol.IV, pp. 182s-182t), yet Mr. Brumfield chose not to pursue that potential issue in his 1986 application. The burden of proof in this application is on the petitioners, Article 930.2, Code of Criminal Procedure, and, as explained *supra* in the State's discussion of Issue 8, petitioners have failed to prove that all previous counsel were unaware of the interview of April 19, 1976.

Issue 9 is barred from judicial consideration by the terms of Article 930.8 and Article 930.4 E, Code of Criminal Procedure.

ISSUE 10 (Pet. Brief, p.86)

Petitioners claim that the State's failure to disclose Mrs. Abney's initial statement was *Brady* error because that statement allegedly contained descriptions of the suspect car and driver that were inconsistent with her trial testimony.

PROCEDURAL BAR

Mrs. Abney's statement (Pet.Ex.24) was part of both the sheriff's investigative file and the district attorney's materials, and as such was available to all of petitioners' previous legal counsel. In fact, petitioners concede that the statement was part of Sheriff Romero's investigation during the 1980's (Pet. Brief, p.89), and the record shows that Sheriff Romero shared with Mr. Brumfield everything gathered by his deputies and himself (Vol.IV, pp.151-24 through 151-25). Sheriff Romero's relationship with petitioners' investigators and legal counsel has been previously discussed.

Mrs. Abney's statement was used by Mr. Brumfield in questioning Captain Comeaux during the latter's deposition on May 7, 1987, – the transcript of which was Mr. Calahan's Exhibit No. 17 in his 1990 application for post conviction relief (Vol.III, pp.377, 509b). Excerpts from that transcript reflect Mr. Brumfield's possession of the Abney statement (Vol.III, p.509B).

Having conceded Sheriff Romero's possession of the Abney statement, petitioners make no effort to prove that their previous counsel were ignorant of that document. Accordingly, they are barred from judicial consideration at this late date by the terms of Article 930.8 A, Code of Criminal Procedure. Petitioners urge, however, that their "innocence" warrants making an exception here. This Court will discuss this claim of innocence as an exception

to procedural default later on in these "Reasons for Judgment."

Issue 10 is barred from judicial consideration by the provisions of Article 930.8 A and Article 930.4 E, Code of Criminal Procedure.

ISSUE 11 (Pet.Brief, p.89)

Petitioners' brief (pp.89-90) urges that the trial judge erred in rejecting the recantations of Herbert Derouen and Mary Arceneaux when he denied post conviction relief in 1986. It is not clear whether petitioners intend this to be a specific legal issue here, but, if they do so intend, the issue is without merit and is barred from consideration.

PROCEDURAL BAR

The rejection of the recantations by Judge Johnson in 1986 (Vol.I, p.73) and by Judge Fleming in 1991 (Vol.II, p.4) were upheld by the Louisiana Supreme Court. Later, during federal habeas corpus proceedings, the United States District Court for the Western District (Vol.IV, p.121) and the United States Court of Appeals for the Fifth Circuit (Vol.IV, pp.141-143) gave short shrift to petitioners' efforts to reverse the holdings of the two state district court judges.

Petitioners assert here, however, that those judicial rulings on the recantations were without the benefit of the new evidence that they claim to have uncovered. As in all of their claims in this application, petitioners offer no proof that all of their prior legal counsel had no knowledge of the "newly discovered evidence" which they now claim impugns the rejection of the recantations.

This issue is barred from judicial consideration as being a successive application that fails to raise a new or different claim, Article 930.4 D, Code of Criminal Procedure. It is also barred by the terms of Article 930.8 A, Code of Criminal Procedure.

ISSUE 12 (Pet. Brief, p.93)

This issue claims that the identification of John Nelson Collins was "fabricated," and focuses upon alleged variances between the deposition of Mrs. Eldridge and her trial testimony.

PROCEDURAL BAR

Petitioners' brief argues the merits of this claim with much hyperbole and with some misunderstanding and misstatement of the facts. The Court finds that this issue is procedurally barred from judicial consideration by Article 930.8 A, Code of Criminal Procedure.

This claim arises from Mrs. Eldridge's deposition of March 25, 1987, in the civil defamation suit. (Pet. Ex. 45). Among those present at that deposition were Sheriff Romero and Mr. Brumfield, one of petitioners' two counsel in 1986. Mr. Brumfield's assistant, Mr. Calahan (Pet. Ex. 114), who took over the post conviction efforts in 1990, was not present at the deposition. Mr. Calahan now claims to have been unaware of Mrs. Eldridge's inability to identify John Nelson Collins as "the man in the field" (Pet. Ex. 114).

The record of petitioners' trial was, of course, available to all of petitioners' prior counsel. From that transcript, they knew that Mrs. Eldridge had testified that she could not say whether "the man in the field" was black or white, and that she could not make identification of any

sort (R.1383, 1388). All of petitioners' prior counsel also had access to the investigative files in the district attorney's and sheriff's offices and were aware that Mrs. Eldridge had, on April 5, 1976, described the man in the field as "a short brown-skinned male," and that she had agreed to assist in the making of a composite drawing of that man. She then assisted a police artist in doing just that, following which she declared the drawing to be a good likeness (Pet. Ex.20, pp.3-4). In the civil defamation suit, (Iberia 59400), Mr. Brumfield's exhibit "Comeaux 1" included an exact copy of Petitioners' Exhibit 20 herein, and Mr. Brumfield's exhibit "Comeaux 4" was Captain Comeaux's handwritten version of the same statement by Mrs. Eldridge (Vol.III, pp. 508 A, 508 C-508 K). As pointed out, *supra*, under Issue 7, the Comeaux deposition was itself an exhibit to Mr. Calahan's 1990 application for post conviction relief (Vol.III, pp.377, 506). Obviously, both Mr. Brumfield and Mr. Calahan knew all of the predicate facts here.

From the above summation of the evidence of record, it is clear that petitioners' counsel, having access to the investigative reports and to the trial transcript, knew of the variance between Mrs. Eldridge's trial testimony (which actually was more favorable to the defendants) and her statements to the investigators. It follows that this issue could have been raised by any one of petitioners' previous counsel in their applications in this court. Their failure to do so is procedural default under Article 930.4 E.

Mr. Calahan later had available to him the transcript of Mrs. Eldridge's deposition mentioned above, although he denies having actual knowledge of her testimony there (Pet. Ex. 114). The fact remains that Mr. Calahan was Mr. Brumfield's assistant in the civil defamation suit (Pet. Ex.

114), and, if, in assuming representation of the petitioners in 1990 he failed to examine those available documents, that failure would be inexcusable. This issue is barred by the limitations of Article 930.8 A and, additionally, by the provisions of Article 930.4 E, Code of Criminal Procedure.

ISSUE 13 (Pet. Brief, p.98)

This issue, labeled "suppression of evidence," appears to complain that the State altered the initial Record of Complaint (Pet. Ex. 16) concerning the color of the suspect vehicle, and also concealed the names of railroad workers who might have had useful information (Pet. Ex. 18)

PROCEDURAL BAR

Once again, petitioners offer only speculation and argument concerning an issue. This court finds that this Issue 13 is barred from judicial consideration by the terms of Article 930.8 A, Code of Criminal Procedure. Petitioners have failed to prove that all of their previous counsel did not have the knowledge needed to have raised this claim at one of the earlier post conviction relief proceedings.

The "Record of Complaint" (Pet. Ex. 16), emanating from the sheriff's office, clearly was to be found in both the sheriff's files and the district attorney's records. That report (Pet.Ex. 16) bears a handwritten notation that Sheriff Romero discussed it with Deputy Upton on "4/19/83." Thus, it is obvious that the "Record of Complaint" has always been available to petitioners via their champions, the Sheriff Romero-Brumfield team. This is confirmed by the fact that, on May 7, 1987, Mr. Brumfield, while questioning Captain Comeaux in the civil defamation suit (Iberia No. 59400), asked him about the report,

thus demonstrating knowledge of its existence (Vol.III, p.509). The transcript of the Comeaux deposition was Mr. Calahan's Exhibit 17 in his 1990 application for post conviction relief (Vol.III, pp. 377, 506). That same "Record of Complaint" was Exhibit 17 in Detective Woodring's deposition of October 6, 1986, in the civil defamation suit, and was referred to in Mr. Calahan's application for post conviction relief in 1990 (Vol.III, p.401).

The second document referred to by petitioners under this issue is an initial report that mentions three railroad workers who had seen a dark blue car approach at high speed near the time of the Hasty Mart crime (Pet. Ex.18). This document is not only entirely consistent with the State's theory of the case, it has never been suppressed. In fact, it bears a notation that it was disseminated to local and neighboring law enforcement agencies. It, too, obviously emanated from the sheriff's office, so file copies were certainly available there and at the district attorney's office for any of petitioners' counsel. This document was also part of Detective Woodring's deposition of October 6, 1986, in the civil suit, where it was labeled "Woodring No. 7." It, too, was referred to in Mr. Calahan's 1990 application for post conviction relief (Vol.III, p.401).

Petitioners have conceded that "it is unclear how much (Mr. Brumfield) knew" when he applied for post conviction relief in 1986 (Pet. Brief, p.100-101). They claim, however that "the interests of justice" warrant consideration of this issue, despite Articles 930.4 E and 930.8 A, Code of Criminal Procedure.

ISSUE 14 (Pet. Brief, p.101)

This claim is labeled simply "Witness intimidation." From petitioners' accompanying legal argument, it can be

gleaned that they are alleging that Mrs. Kathy Eldridge, a prosecution witness, was intimidated when deputies informed her of the dangerous nature of the defendants (Pet. Brief, p.102) and when, after her grand jury testimony, the prosecutor told her "never to pull a stunt like that again, just answer yes or no, be brief as possible" (Pet. Brief, p.102). Petitioners then suggest that, being thus intimidated, Mrs. Eldridge did not disclose to defense counsel the fact that she had seen a car in the Abney driveway and that she differed from Mrs. Abney in her description of that car.

PROCEDURAL BAR

This allegation is most efficiently disposed of by pointing out that, even assuming that it validly alleges a constitutional violation, petitioners are procedurally barred, by the provisions of Article 930.8 A, Code of Criminal Procedure, from raising it at this late date. They have failed completely to prove that all of their previous legal counsel lacked knowledge of the predicate facts.

The Court notes that the record reflects that anything that Mrs. Eldridge had to say about the case was made known to Mr. Brumfield and his team at least as far back as 1985. Although petitioners allege that this information first surfaced during Mrs. Eldridge's 1987 deposition, the record reflects that she was closely cooperating with the Brumfield team well prior to the date of her deposition. She was a willing and cooperative witness when interviewed on October 3, 1985 by private investigator Lauland (Vol.IV.pp.182-Z-6, 182-Z-9), who was employed simultaneously by the Alexander family and by Mr. Brumfield. Present at that interview, at which Mrs. Eldridge willingly

submitted to hypnosis in an effort to enhance her recollection of events, were Sheriff Romero and his Chief of Detectives Kerry Davis – both prominent members of the Brumfield team (Vol.IV, pp.182-Z-6 to 182-Z-9).. That meeting of October 3, 1985 was duly reported by Mr. Lauland to Mr. Brumfield, whose application for post conviction relief in January 1986 recited that he had received Mr. Lauland's final report (Vol.I, p. 309).

Even if it were an indisputable fact that 1986 counsel were unaware of Mrs. Eldridge's "intimidation," petitioners are still procedurally barred from raising the issue after failing to do so in 1990. In his 1990 application for post conviction relief, Mr. Calahan certainly had access to the transcript of Mrs. Eldridge's deposition. Although he denies actual knowledge of that deposition (Pet. Ex. 114), his legal brief in the United States District Court in support of his 1991 application for federal habeas corpus refers to Mrs. Eldridge and "the speeding light blue car" (Vol.IV, pp.14,56). In any event, Mr. Calahan was Mr. Brumfield's assistant in the civil suit (Pet. Ex. 114), and, if, in assuming representation of the petitioners in 1990, he failed to examine those available documents, that failure would be inexcusable. Accordingly, this claim is barred by Article 930.4 E, as well as by Article 930.8 A, Code of Criminal Procedure.

ISSUE 15 (Pet. Brief, p.104)

Petitioners claim here that the State, having made casts of automobile tire tracks in the vicinity of the suspect vehicle's turn-around, destroyed those casts when they failed to match Alexander's tires, did not compare them with the Roy automobile, and failed to disclose all this to the defense.

PROCEDURAL BAR

Petitioners acknowledge that this is a "repetitive issue" (Pet. Brief, p.104), and well they might. It was raised in the 1990 application for post conviction relief and was dismissed by the state judge as being, not only without merit, but as procedurally barred because it had been inexcusably omitted from the 1986 application for post conviction relief (Pet. Ex. 8, p.5).

The issue moved on to the federal courts when Mr. Calahan applied for habeas corpus relief there in 1991. The United States District Court for the Western District of Louisiana held:

> "Because petitioners have failed to show "cause" for the procedural default, this court is precluded from consideration of . . . Issue Seven (the destruction of evidence issue) on the merits." (Vol.IV, p.113)

The procedural default on this issue has obviously been thoroughly litigated in both state and federal courts during Mr. Calahan's representation of petitioners. The federal court, incidentally, found "no miscarriage of justice" exception to procedural default here (Vol.IV, p.113).

Article 930.8 A was not yet applicable to the 1990 application for post conviction relief, but the courts found procedural default under Article 930.4 E. Now that the more stringent requirements of Article 930.8 A are applicable here, its terms, as well as the provisions of Article 930.4 E, bar judicial consideration of Issue 15. Petitioners have failed to prove that all of their previous legal counsel were unaware of the facts upon which this claim is based.

ISSUE 16 (Pet. Brief, p.109)

Petitioners claim here that a *Brady* violation occurred when the State searched Alexander's car for blood and mud traces, and, finding nothing, failed to so inform the defense.

PROCEDURAL BAR

Article 930.8 A bars petitioners from raising this issue now after choosing to ignore it in their 1986 and 1990 applications for relief. Petitioners have failed to prove that all of their previous counsel lacked sufficient knowledge of the facts to have raised this claim had they deemed it worthy of judicial consideration.

The Court finds that petitioners' legal counsel and their colleagues (the private investigators and Sheriff Romero's employees) had full access to the records of the district attorney's and sheriff's offices. They had access to the criminalistics laboratory reports, to file copies of the search warrant (Pet. Ex.22), and to Captain Comeaux's report of April 12, 1976, (Pet. Ex. 29, p.6) wherein he notes that an expert from the Acadiana Criminalistics Laboratory inspected the Alexander car for evidence of blood and mud. Since no mention was made of this evidence at trial, obviously the search had produced no results. Captain Comeaux's report of April 12, 1976, was part of "Comeaux 1,." an exhibit to his deposition of May 27, 1987, which was used by Mr. Calahan as his own Exhibit P #17 in his 1990 application for post conviction relief (Vol.III, pp. 377, 508 A). Clearly, there was no "cause," other than its obvious lack of merit, for failing to raise this issue on previous applications.

This claim is barred by the limitations of Articles 930.4 E and 930.8 A, Code of Criminal Procedure.

ISSUE 17 (Pet. Brief, p.111)

Petitioners claim another *Brady* violation here, alleging that the State suppressed certain allegedly inconsistent statements by Rene Jackson.

PROCEDURAL BAR

Article 930.8 A bars petitioners from raising this "issue" in this latest application for relief. They have failed to prove that every one of their previous legal counsel over the years lacked knowledge of the facts upon which they base this claim.

The Court notes that the very documents upon which petitioners base this claim (Pet. Exs. 95 and 96) are copies of documents that were filed in both the district attorney's and the sheriff's office. As such, these documents were readily available to Mr. Brumfield and the other counsel for petitioners, and especially to Sheriff Romero, who was diligently assisting Mr. Brumfield and the others in overturning the convictions that had been obtained by his political rival.

Mr. Calahan has asserted that, in filing his 1990 application, he lacked knowledge of these documents (Pet.Ex.114), but this assertion is incorrect. Both he and Mr. Brumfield knew of that interview with Jackson, the report of which now appears as Petitioners' Exhibit 95. The original handwritten version of that document appeared in the civil defamation suit as "Woodring No. 27," an exhibit to the deposition of Detective Woodring on October 6, 1986. That handwritten report by Tyler, marked by the clerk in its upper right-hand corner as

"Woodring # 27" (Vol. IV. p. 205) was known to Mr. Brumfield, who was representing the defendants in that civil suit, and to his then-assistant, Mr. Calahan.

In his 1990 application for post conviction relief, Mr. Calahan listed his own Exhibit No. 3 as "A Statement by Steve Woodring" (Vol.III, p.377), which included a letter from Woodring to Sheriff Romero, a summary of Woodring's deposition in the civil suit, and a list of the exhibits to that Woodring deposition – including Ex. 27 – A Statement by Rene Jackson (Vol.III, p.402).

Clearly, Mr. Calahan's omission alone would be procedural default under Article 930.4 E, but it should also be noted that Mr. Calahan acknowledges that "some of the evidence may have been known to Mr. Brumfield" (Pet. Ex. 114).

This claim is barred by Article 930.8 A and by Article 930.4 E, Code of Criminal Procedure.

ISSUE 18 (Pet. Brief, p.112)

Petitioners claim here that Rene Jackson, one of the original defendants, was improperly committed to Central Louisiana State Hospital by the Iberia Parish coroner because "the State wanted to silence him."

PROCEDURAL BAR.

This is another preposterous allegation that is supported only by speculation and argument. The claim has nothing to do with petitioners' convictions; Rene Jackson was in the Iberia Parish jail, was represented by his own legal counsel, and was available as a potential defense witness at all times prior to and during the petitioners' trial (Vol.IV, pp. 189-190).

This claim is most efficiently disposed of by generously assuming, solely for the purpose of these comments, that it raises a valid issue, because it is so obviously barred from judicial consideration at this late date by Article 930.8 A and by Article 930.4 E, Code of Criminal Procedure. Although petitioners allege that "these issues were not previously raised because they were unknown to Petitioners" (Pet. Brief, p.113), there is absolutely no proof of any kind that all of petitioner's previous counsel did not know the facts which have always been a matter of public record, and even reported in local newspaper articles (Vol.IV, p.209).

This "issue" is barred from judicial consideration under the provisions of both Article 930.8 A and Article 930.4 E, Code of Criminal Procedure.

ISSUE 19 (Pet. Brief, p.117, 121)

Petitioners claim "(t)he real issue . . . is that the State succeeded in presenting the gun-swap theory by a combination of false disclosures . . . , evidentiary suppression . . . , and improper examination of Francis . . . " (Pet. Brief, pp.121-122).

PROCEDURAL BAR

Although petitioners assert in argument that the predicate facts of this issue were unknown to them, they have offered no proof whatsoever of this claimed lack of knowledge, as required by Article 930.8 A, Code of Criminal Procedure.

The burden of proving lack of knowledge is upon petitioners, Article 930.2, Code of Criminal Procedure, a burden which they have not met. The record itself reflects knowledge by petitioners' previous counsel.

Whatever petitioners mean by "a combination of false disclosures" (Pet. Brief, p.121), they declare that they were unaware of the falsity of those disclosures until the new information, *viz.*, Demouchet's statement of June 29, 1976, (Pet. Ex.75) and Francis' statement of June 23, 1976, (Pet. Ex. 85), came to light.

Petitioners have conceded that Francis' statement of June 23, 1976 "surfaced during Sheriff Romero's investigation" (Pet. Brief, p.120), and that it "may have been available" to their 1986 counsel. They assert, however, that it was unknown to Mr. Calahan prior to his 1990 application for post conviction relief. In this they err, because Mr. Calahan, in his Second Supplemental Memorandum, dated December 13, 1990, refers to Francis' "confession" in St. Martinville on June 23, 1976, (Vol.III, p.335). Mr. Calahan's failure to be aware of such a document would certainly be inexcusable

Petitioners claim, rather unconvincingly, that Demouchet's statement to Acadia Parish authorities on June 29, 1976, was "previously unknown to Petitioners, having been retrieved from Acadia Parish records by Centurion Ministries' investigator." This statement is unconvincing because Demouchet's statement (Pet. Ex. 75) had to have been in the same files as Francis' statement of June 23, 1976 (Pet. Ex. 85), *viz.*, in both the sheriff's files and the files of the district attorney. That the Centurion Ministries investigator found Demouchet's June 29th statement in Acadia Parish does not mean that it was not also in the Iberia Parish files of both the sheriff and the district attorney. In fact, petitioners declare that " . . . affixed to the front of the D.A.'s file copy of the June 29th Acadia Parish report is a post-it note in the prosecutor's own hand" (Pet. Brief, p.119). This strongly evidences that the

statement (Pet. Ex. 75) must have come from the district attorney's files, where it reposes today, with the original "post it note" still affixed. It appears that petitioners' current counsel is mistaken about where the statement of June 29 was obtained.

This matter is truly immaterial to the constitutional validity of petitioners' convictions. Petitioners exaggerate the significance of Demouchet's self-serving statement of June 29, 1976. That statement would have been admissible at their trial only for the purpose of impeaching Demouchet had he testified otherwise. At trial, however, defense counsel had no reason to impeach Demouchet's testimony – he had delivered to the defense an unexpected gift by testifying that the .32 Clerke revolver belonged to Captain Comeaux (R.1518-1519). This was far better for the defense than a document that would have disclosed to the jury that Demouchet had made a statement that placed the weapon in Alexander's possession. Since Demouchet's trial testimony did not connect Alexander with the murder weapon, defense counsel had no reason to attempt to impeach him with the written statement of June 29, 1976, that traced the weapon back to defendant Alexander.

Because Mr. Brumfield and the other previous counsel had full access to all of the records in this case the statements in question were available in both the sheriff's and the district attorney's files for their use had they deemed them of value. Certainly, petitioners have not proved that Mr. Brumfield and the other counsel were ignorant of the existence of the June 29 statement.

The prosecutor's limited questioning of Francis at trial after Francis had claimed his right against self-incrimination (Pet. Brief, p.123) does not support petitioners' claim here. Defense counsel at trial raised no objection; in fact, he was delighted by Francis' performance. In his closing argument, defense counsel exploited Francis' refusal to testify, arguing that this demonstrated that Francis was guilty of the Hasty Mart crime. "Why would he not testify about the Hasty Mart, if he didn't do it?" (R.1768). This issue was not raised on direct appeal, nor in any previous post conviction relief proceeding, undoubtedly because Francis' performance had helped the defense. In any event, this aspect of Issue 19 is additionally barred from judicial consideration by Article 930.4 B, Code of Criminal Procedure.

Petitioners conclude their argument on this issue with the allegation that the prosecutor called Francis to the witness stand, knowing in advance that Francis would claim his constitutional right to remain silent (Pet.Brief, p.123). In his 1990 application for post conviction relief, Mr. Calahan included, as his Petitioners' Exhibit No.21, a statement by prisoner McZeal to the effect that Francis once told him that his legal counsel had advised him to "take the Fifth" if called to testify in the Alexander-Granger case (Vol.III, p.321). This statement by McZeal does not prove that the prosecutor knew in advance that Francis would refuse to testify. It does show, however, that Mr. Calahan had the same information as present counsel (*see also*, Vol.IV, p.99-p), only Mr. Calahan displayed the better judgment in not making this allegation. Not only is there not a shred of evidence for this accusation, the record reflects that there are two places in Francis' written statement of July 8, 1976, where he told

Captain Comeaux that he was willing to testify in court in accord with that statement (Pet. Ex.91, pp.8, 10).

Petitioners have the burden of proving that all of their previous counsel were unaware of the facts upon which this issue is predicated. Article 930.2, Code of Criminal Procedure. This, they have failed to do. Accordingly, under Article 930.8 A, Code of Criminal Procedure, they are barred from raising it now. Because they also failed to show "cause" for Mr. Calahan's failure to raise this claim in his 1990 application for relief, they are additionally barred from raising this issue by the provisions of Article 930.4 E. The complaint about the prosecution's questioning of Francis at trial was not objected to by trial defense counsel nor was it raised on direct appeal, so Article 930.4 B precludes petitioners from raising it now.

ISSUE 20 (Pet. Brief, p.125)

Petitioners claim here: "Bad faith in the conduct of Francis' interrogation; the suppression of 2 out of 3 confessions by Francis; and the suppression of corroborative evidence."

PROCEDURAL BAR

The Court will assume, for the purposes of this procedural default discussion only, that these allegations of mishandling the interrogation of Gerry Paul Francis (who never actually testified at trial) somehow might have affected the constitutional validity of petitioners' convictions.

Petitioners have devoted twelve pages of argument to this issue, making it difficult to ascertain the specifies of their claim. It is noted, first, that whatever the specifics are, the petitioners have not carried their burden of

proving that all of their previous counsel were unaware of the predicate facts behind these claims. Accordingly, Issue 20 is procedurally barred by the terms of Article 930.8 A, Code of Criminal Procedure.

The allegation that the sheriff's detectives were in "bad faith" while interrogating Francis, is obscure and raises no constitutional issue. Francis refused to testify at petitioners' trial, so the manner in which he was interrogated had no impact on petitioners' trial. Even if there were some aspect of the interrogation that might have supported the "bad faith" allegation, all of petitioners' many legal counsel have had access to the investigative reports and transcripts which would reveal the nature of those interrogations. The whole issue of Francis' many statements to various authorities, and the alleged unfair interrogation by Captain Comeaux, was included in Mr. Calahan's application for post conviction relief in 1990 (Vol.III, pp.335-337, 371). Revival of those matters is barred by Article 930.4 D, Code of Criminal Procedure.

Next, petitioners specify that the State suppressed two of Francis' three statements (Pet. Brief, p.125). The first of these statements appears to be the one made to St. Martin parish authorities on June 23, 1976, shortly after Francis' arrest for the Parks bank robbery (Pet. Brief, pp. 125-126). That this particular statement was known to previous counsel is reflected in Mr. Calahan's reference to it in his Supplemental Memorandum of Law, December 13, 1990, filed in the 16th Judicial District Court (Vol.III, p.335). He also refers to it in his Memorandum of Law in the United States District Court in support of his 1991 application for federal habeas corpus (Vol.IV, p.36-42).

The second such statement by Francis, allegedly "suppressed" by the State, appears to be, not a direct statement by Francis himself, but a note by Freddie McZeal, a fellow prisoner, reporting that Francis had confessed to him (Pet. Brief, p.133). Although petitioners declare that the note was found in the files of the Acadia Parish district attorney, that does not prove that it was not also in the files of the addressee, Sheriff Wattigny of Iberia Parish, where it would have been available to all of petitioners' previous counsel. Petitioners have failed to prove that every one of those prior legal counsel was unaware of the McZeal letter, so this aspect of the claim is also barred procedurally.

It is clear from the record that the McZeal note of June 30, 1976, to Sheriff Wattigny, was known to Mr. Calahan. In his Supplemental Memorandum of Law, filed on November 5, 1990, Mr. Calahan discusses Francis' "confession" to McZeal (Vol.III, p.317) and attaches an "affidavit" in which McZeal relates writing the note to Sheriff Wattigny (Vol.III, p.319). Obviously, Mr. Calahan had full knowledge of McZeal's role in the case – including any inculpatory statements that Francis may have made to him. Mr. Calahan's Memorandum of Law to the United States District Court in 1991 also discusses the Mc Zeal note at length (Vol.IV, pp.40-41).

Petitioners refer in their brief to yet another statement by Francis, made to Acadia Parish authorities on July 2, 1976, in which Francis said, "Preston had already shot three people . . . " including "the old man in New Iberia." (Pet.Ex.87). Although petitioners declare that this statement was uncovered by them in Acadia Parish, this is not proof that their previous counsel did not have access to that statement at some point in their own investigations.

In any event, this July 2, 1976, statement adds nothing to petitioners' case, because it is entirely consistent with Francis' earlier statement of July 1, 1976, to Iberia Parish detectives (Pet. Ex. 88), which he later retracted. That July 1, 1976, statement was Mr. Calahan's Exhibit No. 4 in his 1991 application for habeas corpus in federal court (Vol.IV, p.37). The record reflects that nothing concerning Francis' many statements was not known to petitioners' previous counsel.

Finally, petitioners suggest that the State suppressed several other items of evidence relating to Francis' statements. This allegation of suppression of details of the Hasty Mart crime is patently invalid because those details are spelled out in the investigative reports (Pet. Ex.20) to which all prior counsel had access.

This issue is barred from judicial consideration under the limitations prescribed in Article 930.8 A and Article 930.4 E, Code of Criminal Procedure.

ISSUE 21 (Pet.Brief, p.137)

Petitioners describe this claim as arising from the State's "(b)ad faith in opposing Roy's confessions and in impeaching him at trial."

PROCEDURAL BAR

Petitioners' bare-bones definition of Issue 21 is augmented by lengthy, and sometimes misleading, argument (Pet. Brief, p.137-146). The Court assumes, for this procedural discussion only, that petitioners have alleged a valid claim. It is a claim, however, that is clearly barred from judicial consideration. Like all of the others, it is barred by the time limitations of Article 930.8 A, Code of Criminal Procedure, and is additionally barred by Article 930.4 D,

because it fails to raise a new or different claim that was not raised in prior proceedings.

Commencing with petitioners' trial in 1976, Malcolm Roy's credibility as a defense witness has been the subject of intense debate by counsel on both sides of this case. However, Roy's trial testimony obviously failed to raise a reasonable doubt in the jurors' minds and, on direct appeal to the Louisiana Supreme Court, defense counsel did not even bother to raise an issue involving Roy's testimony (Vol.I, pp.384, 393).

In their 1986 application for post conviction relief, petitioners included an affidavit intended to corroborate Roy's trial testimony (Vol.I, p.328). Applying to the Louisiana Supreme Court for writs, petitioners again argued Roy's credibility as a defense witness (Vol.I, pp.38-39), but to no avail. The Louisiana Supreme Court denied writs (Vol.I, p.1).

Petitioners, in their 1990 application for post conviction relief, pressed strongly for the credibility of Roy's trial testimony (Vol.III, pp.357, 360-363), ignoring the fact that he had later pleaded guilty to perjury for testifying as he had. Petitioners' exhibits to their brief for that 1990 application included a summary of a deposition that Roy had given in the civil defamation suit on September 22, 1986 (Vol.III, pp.482-535). It is interesting to note that Mr. Calahan's Exhibit 20 in his 1990 application was an excerpt from the court proceedings in which Malcolm Roy pleaded guilty to committing perjury when he testified for the defense at petitioners' trial (Vol.III, p.535).

In dismissing petitioners' 1990 arguments concerning Malcolm Roy, an argument that intermeshed with their issue on Arceneaux's and Derouen's recantations, the state

district court did not single out the Malcolm Roy aspect for a specific ruling (Pet.Ex.8, p.3). However, in applying to the Louisiana Supreme Court for writs, petitioners went back to Roy's version of events in arguing the merits of their Assignment of Error No. 1 (Vol.II, pp.42-43). The Louisiana Supreme Court again denied writs (Vol.II, p.1).

By the time they applied for federal habeas corpus in 1991, petitioners apparently had abandoned the idea of claiming constitutional error involving Malcolm Roy. In the course of arguing other issues, petitioners did make passing references to Roy's testimony as a defense witness (Vol.IV, pp. 44, 56-57).

From the foregoing recital of the legal proceedings in which Malcolm Roy was in any way an issue, it appears that, as the courts repeatedly rejected petitioners' claims involving Roy, petitioners lost interest in the Roy issue until its exhumation for these proceedings..

This is an old issue, and is barred procedurally under Article 930.4 D, Code of Criminal Procedure. Additionally, it is barred by the limitations of Article 930.8 A because petitioners have not proved that all of their previous counsel were unaware of the matters that they raise in this last issue.

In the final portion of their brief (pp.153-179), petitioners acknowledge the existence of procedural bars to their current claims. They argue, however, that this Court should grant an exception to Louisiana's statutory procedural barriers because petitioners are "actually innocent" of the 1976 crime. (Pet. Brief, pp. 153-154).

In support of this claim of "actual innocence," petitioners have submitted their own joint affidavit with a

bald declaration of innocence, adding that "with the exception of alibi evidence that their lawyers decided not to introduce at trial, they were unaware of any exculpatory facts that their counsel withheld either at trial or in applications for post conviction relief" (Pet. Ex. 111).

This affidavit by petitioners, in effect, concedes that they have no "new reliable scientific evidence, trustworthy eye-witness accounts, or critical physical evidence that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). *Ergo*, they cannot demonstrate "actual innocence."

In asserting their "actual innocence" here, petitioners offer nothing that was not taken into consideration by the United States District Court in 1993 when that court declared that its refusal to consider several of petitioners' claims because of procedural default would not result in a "fundamental miscarriage of justice" (Vol.IV, p.113). The factual situation having remained unchanged, it would seem that the federal court's 1993 conclusion on this issue is still controlling.

From their joint affidavit (Pet. Ex. 111), it appears that petitioners are relying entirely upon a theory of alibi as to their whereabouts at the time of the crime. Petitioners' brief offers a misleading argument that all of the Hasty Mart participants had solid alibis for the critical time periods, therefore petitioners are innocent. This argument, like much of petitioners' brief, is so full of factual inaccuracies as to cast serious doubt upon the credibility of any unverified statement petitioners might make. Their attempt to revive an alibi defense is palpably

without merit, especially since claims of alibis for Alexander and Granger have repeatedly been raised, refuted, and judicially rejected throughout the long history of this case.

At the trial in 1976, only Alexander offered any sort of alibi, but that attempt did not turn out well for the defense (R.1540-1557). Defendant Granger chose to remain silent, and alibi was not even an issue on the direct appeal of the convictions (Vol.I, p.336). However, in the 1986 application for post conviction relief, Mr. Brumfield raised the issue of ineffective trial counsel, specifying that Alexander's counsel had failed to call available alibi witnesses (Vol.I, p.309). The State's answer pointed out that Alexander's counsel had astutely and ethically chosen not to press too far in presenting Alexander's taxicab alibi, which featured questionable witnesses, vulnerable to cross-examination, and falsified taxi logs, vulnerable to exposure (Vol.I, p.244), The state district court ruled that Alexander's counsel had not been ineffective (Vol.I, p.86). Upon application for writs, Mr. Brumfield again argued his alibi issue (Vol.I, p.46), and was again successfully refuted by the State (Vol.I, p.19).

In the 1990 application, Mr. Calahan resurrected the old Alexander alibi claim, and also came up with a new and complete alibi for defendant Granger (Vol.III, pp. 375-376, 462). In a letter to the state judge in December, 1990, Mr. Calahan included yet another affidavit purporting to support an alibi for Granger (Vol.III, p.337½), but the State was quick to point out the flaws in that new claim (Vol.II, pp. 87, 98-102), and the state courts denied relief (Vol.II, pp. 1, 65).

In his 1991 petition for federal habeas corpus, Mr. Calahan accused both of petitioners' trial counsel of

ineffectively pursuing the possibility of alibis for their clients (Vol.IV, pp.59-60). Again, the State refuted those alibi arguments (Vol.IV, pp.98-99), and Mr. Calahan filed a Rebuttal with additional argument as to how trial counsel should have proved the alibis (Vol.IV, pp.99Y-99Z).

In denying habeas corpus in 1993, the United States District Court showed that it was not impressed by Mr. Calahan's allegations that trial counsel had mishandled their clients' alibi evidence. The court said:

> "A careful review of the record shows that trial counsel was extremely knowledgeable, thorough, and zealous throughout the course of the case.
>
> The evidence against petitioners was overwhelming. The trial deficiencies cited by petitioners are either unsupported by the record, or constitute strategic decisions made by able counsel. There is nothing whatsoever in the record to support petitioners' claim that trial counsel was deficient. Consequently, relief under *Strickland* is unwarranted" (Vol.IV, p.129)

Ignoring the state and federal court rejections of their previous claims that Alexander and Granger had valid alibis, petitioners have attempted to revive those alibi claims as evidence of their "actual innocence." In this effort, they have introduced no new evidence, but have simply re-argued issues that have long since been disposed of. This effort does not even approach a demonstration of "actual innocence." *Schlup v. Delo, supra.*

Petitioners have also marshaled "alibis" for the other participants in the Hasty Mart crime (Pet. Brief, pp. 170-176), although, except for Alexander's tentative efforts at

trial, not a single one of the defendants who was convicted at trial or who pleaded guilty (each with his own legal counsel) chose to risk an alibi defense. A few comments as to these other "alibis" might be in order here.

Petitioners's scenario as to Herbert Derouen's whereabouts at the time of the crime (Pet. Brief, p.170; Pet. Ex. 83) is part of his post trial recantations, which have already been rejected by the state and federal courts as unworthy of belief (Vol.I, p.73; Vol.IV, pp.121-123).

The claim that Mary Arceneaux was "probably" in Lafayette on the day of the crime arises from an interview by private investigator Lauland with Mrs. Bernice Domingue on April 20, 1983 (Pet. Ex. 73). Petitioners' argument fails to mention, however, that, during that same interview, Mrs. Domingue stated that Mary Arceneaux had told her that a friend had taken the child to Lafayette in her stead (Pet. Ex. 73, p.12). This same information was known to petitioners at least since July 23, 1981 when one of Sheriff Romero's detectives interviewed Mrs. Domingue at the sheriff's direction. That report was Exhibit No. 1 to Sheriff Romero's affidavit in the civil case (Vol.IV, pp.154, 156 B), This interview is **not** only of no evidentiary value, it is far too late to raise it in this third application for post conviction relief.

The affidavit of Mrs. Geraldine Mitchell (Pet. Ex. 122) to the effect that she had not seen Mary Arceneaux in her Candlelight Bar on March 30, 1976, is not "fatal to the State's case" (Pet. Brief, p.171). The State's evidence at trial showed that Herbert Derouen had waited in the club until Mary Arceneaux went in to summon him (R. 1475-1476). That Mrs. Mitchell may not have seen Mary Arceneaux does not mean that it did not happen as related

by Derouen. In any event, this, too, is old evidence, known to petitioners since July 29, 1981, as a result of Detective Don Durall's investigation for Sheriff Romero (Vol.IV, p. 156 C). Detective Durall's report summarizes his interview with Mrs. Mitchell on July 29, 1981, substantially in accord with her affidavit filed here by petitioners (Pet. Ex. 122). His report of that interview was available to the Sheriff Romero-Brumfield team almost five years before their first application for post conviction relief. This is not new evidence as contemplated by *Schlup v. Delo, supra*.

The remaining "alibis" conjured up by petitioners present nothing that was not known as far back as the time of their trial in 1976, and certainly are not new evidence of petitioners' innocence. Petitioners have presented no new facts to demonstrate their actual innocence, instead, they offer only argument while frankly conceding that they have no new evidence to establish their "actual innocence" (Pet. Ex. 111). *Schlup v. Delo, supra*.

Petitioners were duly convicted following their trial by jury, and their convictions were affirmed by the Louisiana Supreme Court. In her 1993 "Report and Recommendation," which was approved by the United States District Judge in denying federal habeas relief to petitioners, the magistrate judge stated: "The evidence against petitioners was overwhelming" (Vol. IV, p. 129).

Quite apart from the trial record of petitioners' guilt, a number of "extra judicial considerations" confirm the validity of the jury's verdicts. These "extrajudicial considerations" were not a part of petitioners' trial, but are collateral evidence which, as a matter of common sense, supports the convictions. They were part of the district attorney's response to Centurion Ministries report of 1997,

and are included in Volume IV, pp. 229-290 simply to insure that the record be complete.

Assuming that petitioners have shown that they are "actually innocent" (which they have not done), this still does not solve their procedural problem here. All of the discussion in this brief thus far on the claims of "actual innocence" has been simply for the purpose of clarifying the record into which petitioners have introduced their misleading and repetitive alibi arguments. The "actual innocence" claim has no bearing on the critical procedural issue in this state court, an issue which is relatively simple: If petitioners have not proved that they meet the single statutory exception set out in Article 930.8 A, are they now absolutely barred from raising their multiple issues twenty-three years after their convictions?

The answer to this question is clearly and unequivocally set forth in Article 930.8, Code of Criminal Procedure, as amended in 1999:

> A. No application for post conviction relief . . . shall be considered if it is filed more than two years after the judgment of conviction, and sentence has become final under the provisions of Article 914 or 922, unless any of the following apply:
>
> (1) the application alleges, and the petitioner proves or the state admits, that the facts upon which the claim is predicated were not known to the petitioner or his attorney.
>
> * * *
>
> (3) The application would already be barred by the provisions of this article,

> but the application is filed on or before October 1, 2001, and the date on which the application was filed is within three years after the judgment of conviction and sentence has become final.
>
> * * *

Petitioners' convictions became final in 1977 (Vol.I, p.336; Article 922, C.Cr.P.), so, by the explicit terms of Article 930.8 A, Code of Criminal Procedure, they are procedurally barred from having their latest claims considered by this court unless they come within the single statutory exception of Article 930.8 A (1).

As the State has demonstrated throughout its brief, petitioners are unable to prove that all of their previous legal counsel were not aware of the facts upon which their multiple claims are based. They have not met their burden of proof, Article 930.2, Code of Criminal Procedure, in that regard, and apparently they recognize their inability to do so, because they seek to "hurdle the procedural bars" (Pet. Brief, p.153) via their specious claims of "actual innocence."

While "actual innocence" has been recognized as a possible method of hurdling the procedural bars in the federal court system. *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), there is no such exception to Louisiana's strict limitations prescribed in Article 930.8. In referring to this point, the Louisiana Supreme Court noted that

> " . . . if a state's failure to provide any post conviction relief procedure at all does not violate the Fourteenth Amendment due process clause, then *a fortiori*, Article 930.8 A, a state statute which

> merely limits an inmate's avenue for post conviction relief, cannot violate that clause. *State ex rel Glover v. State*, 660 So.2d 1189 (La. 1995).

Beyond those expressly stated in the Article, there are no exceptions to the limitations set by the Louisiana legislature when it enacted Article 930.8. Again, the Louisiana Supreme Court in *Glover, supra*, said:

> " . . . Art. 930.8 was designed to limit the time period for filing applications for post conviction relief . . . Secondly, Article 930.8 accomplishes that result by precluding courts from considering an application for post conviction relief unless certain specifically enumerated exceptions apply. Third, . . . Art. 930.8 (A) clearly and unambiguously sets forth **the only exceptions** to its limitation periods . . . " (*emphasis added*)

and,

> " . . . In our view, the fact that the trial court reached the merits in an untimely filed application for post conviction relief, when the application did not fit within one of the exceptions in Art. 930.8 A did not preclude the court of appeal from raising Art. 930.8's time bar. Article 930.8 (A) provides that "no application for post conviction relief shall be considered" if it is filed more than three years after the judgment of conviction and sentence have become final, unless one of Art. 930.8's exceptions apply. None of the exceptions to Art. 930.8's time limit were present, or even alleged, in Glover's post conviction application. As such, it was not error for the court of appeal to deny relief based on the time bar in Art. 930.8."

If the Louisiana legislature had wished to qualify the time limitations of Article 930.8 with additional exceptions such as "interests of justice" or "actual innocence," it would have included such language as is found in Article 930.4 A. It is clear that Article 930.8 A is intended to fix a definite time limitation on applications for post conviction relief, with the only exceptions being those specified in the Article itself. *State ex rel Glover*, 660 So.2d 1189 (La. 1995).

In conclusion, this Court finds that all twenty-one issues in this application for post conviction relief are procedurally barred by the time limitations of Article 930.8 A, Code of Criminal Procedure. Additional limitations set out in Article 930.4 D apply to Issues 2, 5, 6, 11, 15, 20, and 21, all of which fail to raise new or different claims. Issues 1, 3, 4, 7, 8, 9, 10, 12, 13, 14, 15, 17, 18, 19, and 20 are new claims inexcusably omitted from prior applications for relief, so they are additionally barred by the terms of Article 930.4 E, Code of Criminal Procedure. (NOTE: Issue 19 is also barred by Article 930.4 B, and Issue 20 is barred by three separate statutory limitations, because of the multiple allegations therein.)

Petitioners have failed to prove that they fall within the single statutory exception to the limitations of Article 930.8 A, Code of Criminal Procedure. Their attempt to hurdle the statutory barrier by creating a jurisprudential exception of "actual innocence" is an utter failure, not only because they have not been able to prove "actual innocence," but because such an exception is contrary to Louisiana's clearly expressed concept of the procedures to be observed in seeking post conviction relief by convicted state prisoners.

Alexander and Granger were fairly tried and convicted twenty-three years also. Represented by a series of retained legal counsel in state and federal courts, they have repeatedly, and unsuccessfully, attacked the validity of those convictions. Now, a seventh lawyer is attempting to revive issues that were either discarded by previous counsel as without merit or were rejected by the courts. Petitioners' current lawyer was retained on their behalf by Centurion Ministries, Inc., seeking judicial vindication of their partisan report in 1997 and of their representations to CBS's *60 Minutes* program that they had uncovered an injustice worthy of that network's publicity machine (Ibid, pp.3-4). A true quest for justice is a noble enterprise, and, as the long history of this case reveals, no stone has been left unturned on petitioners' behalf in the past. But, to exhume all of these long-dead issues, and to attempt to paint them in living, misleading colors, is a perversion of the legal system, and flouts Louisiana's legislative and judicial intent that criminal convictions must, at some time, become final. *State ex rel Glover v. Louisiana*, 660 So.2d 1189 (La. 1995).

OFFICIALLY in Chambers, New Iberia, Iberia Parish, Louisiana, September 18, 2001.

/s/ William D. Hunter
William D. Hunter, Judge
Division D

The Supreme Court of the State of Louisiana

DAVID LYNN ALEXANDER (DOC #85828) AND HARRY JUNIUS GRANGER (DOC #85829)

VS. NO. 2001-KP-2919

BURL CAIN, WARDEN LOUISIANA STATE PENITENTIARY ANGOLA, LOUISIANA

IN RE: Alexander, David Lynn etal; Granger, Henry Junius; – Plaintiff(s); Applying for Supervisory and/or Remedial Writs, Parish of Iberia, 16th Judicial District Court Div. D, Nos. 26,375;

September 19, 2003

Denied.

CDT

CDK

JPV

JTK

JLW

CALOGERO, C.J., would grant in part and order the district court to hold a hearing. In all other respects, I would deny the writ application.

JOHNSON, J., would grant in part and order the district court to hold a hearing. In all other respects, I would deny the writ application.

Supreme Court of Louisiana
September 19, 2003

/s/ Rau T. Daigle
Deputy Clerk of Court
For the Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30973

IN RE: DAVID LYNN ALEXANDER; HARRY JUNIUS GRANGER,

Movants.

Motion for an order authorizing
the United States District Court for the Middle
District of Louisiana to consider
a successive 28 U.S.C. § 2254 application

(Filed Nov. 5, 2003)

Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

BY THE COURT:

David Lynn Alexander, Louisiana inmate #85828, and Harry Junius Granger, Louisiana inmate #85829, who are represented by counsel, move pursuant to 28 U.S.C. § 2244(b) for an order authorizing them to file a successive application for a writ of habeas corpus. A jury convicted Alexander and Granger of the 1976 armed robbery of a Hasty Mart during which the owner of the convenience store was shot and killed. Alexander and Granger were sentenced to 99 years' imprisonment without benefit of parole, probation, or suspension of sentence.

To obtain the requested relief, Alexander and Granger must make a prima facie showing that either (1) their

claims rely on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (2) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and that the underlying facts, if proved, would be sufficient to establish by clear and convincing evidence that a reasonable trier of fact would not have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2).

Alexander and Granger contend that the State suppressed a portion of a recorded statement provided by informant Mary Arceneaux. They assert that the undisclosed portion of the statement corroborated an affidavit produced by Detective Woodring and demonstrated that Arceneaux's identification and testimony were incredible. Alexander and Granger contend that the State withheld information concerning Arceneaux's misidentification of Dan Tharpe.

Alexander and Granger contend that the State did not disclose a recording of an April 1976 interview of Herbert Derouen. They allege that the recording shows that Derouen lacked knowledge of the basic details of the robbery and that authorities coached him to obtain his trial testimony.

Alexander and Granger contend that the State withheld a report dated June 23, 1976, a letter dated June 30, 1976, and a statement provided on July 2, 1976. They allege that these documents provided evidence of Jerry Paul Francis's confession to the Hasty Mart robbery, information that contradicted the theory used by the State to discredit Francis's confession, information that refuted

the State's gun-swapping theory, and Francis's identification of the man who shot the Hasty Mart store owner.

Alexander and Granger argue that they are innocent, that consideration of their proposed 28 U.S.C. § 2254 application and the record as a whole demonstrates their innocence, and that but for the numerous constitutional violations perpetrated by the State, the outcome of their trial would have been different.

Alexander and Granger have not demonstrated that the factual predicate for their claims could not have been discovered previously through the exercise of due diligence and that the underlying facts, if proved, would be sufficient to establish by clear and convincing evidence that a reasonable trier of fact would not have found them guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(B). Accordingly, the motion for authorization to file a successive 28 U.S.C. § 2254 application is DENIED.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Art. I, §9, cl. 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U.S.C. §2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

* * *

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless-

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

* * *

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district

within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. §2244

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

* * *

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable

factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

* * *

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

* * *

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or or for a writ of certiorari.

* * *

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation shall run from the latest of –

B) the date on which the impediment to filing an application created by State action in violation of the constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; . . . or

* * *

D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. §2254

* * *

d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

* * *

2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.